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ABSTRACT

Law review and journal articles on sexual harassment in higher education are presented along with policies and procedures from selected universities and organizations, guidance on drafting policies, and a selected bibliography. The following law review and journal articles are presented: "Recent Legal Developments in Sexual Harassment" (Elsa Kircher Cole); "The Supreme Court--Leading Cases" (excerpt from the Harvard Law Review); "Sexual Harassment in Higher Education: An Assessment Study" (Nancy Maihoff and Linda Forrest); "Sexual Harassment on Campus: An Institutional Response" (Arlene Metha and Joanne Nigg); "Activism, Research, and Policy: Sexual Harassment" (Sue A. Blanshan); "Implementing a Sexual Harassment Program at a Large University" (Lou Anna K. Simon and Linda Forrest); "Establishing an Informal Grievance Procedure for Cases of Sexual Harassment of Students" (Phyliss M. Meek and Ann Q. Lynch); and "Consensual Amorous Relationships between Faculty and Students: Policy Implications and the Constitutional Right to Privacy" (Elisabeth A. Keller). Sample statements and policies are provided from Harvard University Faculty of Arts and Sciences, University of Iowa, University of North Carolina at Charlotte, American Council on Education, and American Association of University Professors. The following articles and resources are also included: "To Draft a More Perfect Policy: The Development of the University of Iowa's Sexual Harassment Policy" (Mary Jo Small and Julia Mears); three outlines from NACUA ("Recent Developments in Sexual Harassment," by Elsa Kircher Cole; "Sex Discrimination: Preventing and Defending Sexual Harassment Cases," by Steven G. Olswang; and "Legal Considerations in Drafting Sexual Harassment Policies for Public Universities," by Thomas R. Trager); and a selected bibliography that contains 66 references of materials on sexual harassment, prepared by Joan E. Van Tol. (KM)

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Sexual Harassment On Campus: A Legal Compendium

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National Association of College and University Attorneys

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SEXUAL HARASSMENT ON CAMPUS:

A LEGAL COMPENDIUM

National Association of College and University Attorneys

1988

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The National Association of College and University Attorneys (NACUA), founded in 1960-61, is comprised of some 1,200 campuses (approximately 630 institutions), represented by more that 2,300 attorneys. Its goal is to improve the quality of legal assistance to higher education by educating attorneys and administrators to the nature of campus legal issues. NACUA produces publications and seminars, and operates a clearinghouse through which attorneys share their knowledge and work products.

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EDITOR'S NOTE

With the publication of Sexual Harassment on Campus: A Legal Compendium, the National Association of College and University Attorneys offers a new service to its members as well as the higher education community at large. The Legal Compendium pulls together in one convenient source the leading law review and journal articles on sexual harassment in higher education; it includes the sexual harassment policies and procedures from several universities and organizations; it provides some guidance for administrators on the drafting of sexual harassment policies; and it includes a selected bibliography of policies and procedures, NACUA outlines, books and monographs, articles, and federal and state cases that will allow the reader to study and research the issues further.

Contributions to this compendium were received from a number of leading authorities: Elsa Kircher Cole, Assistant Attorney General for the state of Washington, contributed the foreword to the compendium as well as an outline and law review article. Mary Jo Small, Associate Vice President for Finance and University Services, and Julia Mears, Esq., Assistant to the President, both of the University of Iowa, prepared the section on drafting a sexual harassment policy. Elisabeth Keller, a student at The Ohio State University College of Law, revised her 1st prize winning entry to the NACUA Student Legal Writing Competition to provide a section on consensual relationships. The NACUA Legal Reference Service staff, with the assistance of the ERIC Clearinghouse on Higher Education, prepared the selected bibliography. We are most grateful for these contributions and acknowledge with thanks the various authors' endeavors.

We also are indebted to those persons who lent their assistance in the preparation of this compendium by allowing us to reprint their work. In particular, we would like to thank the NACUA members who responded to requests for sexual harassment policies and allowed us to reprint them for their colleagues' scrutiny. We encourage the submission of additional policies for inclusion in NACUA's Exchange of Legal Information files.

We trust you will find this compendium to be of value. As always, we are eager to receive your comments and suggestions on this publication.

Joan Van Tol
Editor
November 1987

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FOREWORD

A professor shows slides of Playboy centerfolds as illustrations for his anatomy class, a dean puts his arms around a female professor and massages her neck in front of others at an academic conference, a drama professor encourages students in a physically non-threatening way to perform various sexual acts on him to release their inhibitions and thus improve their acting skills--all of these incidents have actually occurred on college and university campuses.* In years past, such behavior when brought to the attention of academic administrators might have been shrugged off or simply considered to be distasteful and inappropriate. Today, however, after the United States Supreme Court's decision in Meritor Savings Bank v. Vinson, the receipt of complaints of such incidents requires an institution of higher education to take prompt action to determine the facts surrounding the incidents because each complaint has the potential of constituting actionable sexual harassment necessitating an immediate and appropriate response by the institution.

Sexual harassment is a type of sexual discrimination prohibited by Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-2, and by analogy, by state laws prohibiting sex discrimination. It also is arguably prohibited by Title IX of the Education Amendments of 1972.

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* See P. Franklin, H. Moglen, P. Zatlin-Boring and R. Angress, Sexual and Gender Harassment in the Academy: A Guide for Faculty, Students and Administrators (1981) at 22; Howard University v. Best, 484 A.2d 958, 981 (D.C. 1984); Micari v. Mann, 481 N.Y.S.2d 967, 968 (1984).

The best definition of sexual harassment is probably that in the EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11, as used by the United States Supreme Court in Meritor. Those guidelines define sexual harassment in employment as

> [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature ... when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, [quid pro quo harassment] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, [quid pro quo harassment] or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment, [condition of work harassment].

The EEOC definition of sexual harassment is also appropriate for defining sexual harassment of students by faculty by merely inserting the references to the academic arena in place of the reference to the working environment.

Examples of "quid pro quo" sexual harassment in the academic environment include: the lowering of a student's grade upon her refusal to attend a social function with a faculty member; suggestions that consent to a sexual affair is the only way to get an "A" in a class; and the refusal to give assistance or direction on a thesis after a student terminates a previous consensual relationship with the faculty member. Examples of the "offensive environment" type of sexual harassment in an academic setting include a professor's use of unnecessary sexual remarks and inuendos in class or physical contact with a student of a nature that interferes with a reasonable student's work performance and seriously affects his or her psychological well-being.

An institution of higher education is strictly liable for acts of "quid pro quo" harassment by a supervising employee toward a subordinate employee and, arguably by analogy, for the acts of a professor who so harasses a student. For acts of offensive environment harassment an institution is liable if the harassing supervisor is acting as the University's agent in taking those actions and if that supervisor's advances are so pervasive and continuous that the institution must have been conscious of them. A similar argument might be advanced regarding the college or university's liability for the offensive environment created by a professor, although the University's ability to supervise its faculty is obviously more difficult than supervising line staff.

In light of their potential liability for "quid pro quo" and "offensive environment" sexual harassment, many colleges and schools have attempted to limit their liability by adopting grievance procedures that require prompt remedial action for acts of harassment. Some campuses have adopted policies that prohibit consensual relationships between faculty and students.

The Supreme Court in Meritor held, however, that the mere existence of a general grievance procedure does not necessarily provide an employer a shield against litigation for sexual harassment. The court's opinion in Meritor indicates that in order to help insulate the employer from liability, the grievance procedure must be tailored especially toward ending sexual harassment, it must be well publicized to employees and students, and it must not discourage grievances by requiring as a first step that the grievant face his or her harasser. Finally, the procedure must require that institution promptly respond to each grievance.

Even after Meritor many issues remain to be resolved. Courts have not yet examined the concept of offensive environment discrimination in academia with the same thoroughness they have in the employment setting. There is no case similar in stature to Meritor in the academic environment. It is likely this will be a fruitful source of litigation in coming years.

Existing case law provides little guidance for institutions that are attempting to adopt sexual harassment policies that will allow them to avoid imputed liability as the harasser's employer or supervisor. Case law is also limited on the appropriate action to be taken by an institution to limit or avoid liability when it becomes aware of a claim of sexual harassment. Questions about the amount and type of due process that must be accorded the alleged harasser during the institution's investigation and resolution of allegations of sexual harassment also remain relatively unanswered.

Policies restricting or prohibiting dating between faculty and students in their classes, or on the campus or who are attending the university are another potential source of litigation.* First Amendment rights of privacy and rights of association are certain to be litigated as a result of such policies. Arguably, there can never be a consensual relationship between a supervisor and a subordinate or a professor and a student because of the power inherent in the superior's position. Additionally, there will be an increasing tension between the abandonment of the theory of in loco parentis and laws requiring institutions to protect their students in their sexual

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*See Section I of this compendium for a discussion of policies prohibiting consensual relationships.

encounters. There will have to be a balancing and reconciling of those ideas.

Attorneys are increasingly seeking alternative theories such as the various common law tort theories to recover damages for sexual harassment. Multiple claim lawsuits arising from an incident of sexual harassment are the norm rather than the exception and litigation involving such alternative theories is only going to increase in the coming years.

For these reasons, and to be better able to respond to the need for a well articulated procedure and policy for handling allegations of sexual harassment, institutions of higher education must be aware of the developments in this area of the law. Colleges and universities must educate faculty and staff to the fact that behavior that might have been condoned in years past is no longer tolerated. The materials that follow provide a firm basis to examine the policies and practices on a campus and to develop additional ways to help end sexual harassment at an institution of higher education and limit its legal liability as well.

Elsa Kircher Cole

November 1987

I. ARTICLES ON SEXUAL HARASSMENT

RECENT LEGAL DEVELOPMENTS IN SEXUAL HARASSMENT**

ELSA KIRCHER COLE*

INTRODUCTION

With the advent of the United States Supreme Court decision in *Meritor Savings Bank, FSB v. Vinson*,[1] one no longer can dismiss a claim that sexual harassment is a type of sexual discrimination in terms, conditions, or privileges of employment prohibited by Title VII of the Civil Rights Act of 1964,[2] as a novel theory or as beyond the intent of Title VII's drafters.[3] Further, sexual harassment now includes not only harassment in which a supervisor demands sexual consideration in exchange for job benefits (quid pro quo harassment),[4] but also harassment that creates an offensive environment for the employees (condition of work harassment).[5] In addition, sexual harassment of students in institutions of higher education increasingly justifies disciplinary action against a faculty or staff member, generally under a charge of "unethical

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[1] 106 S. Ct. 2399 (1986).

[2] 42 U.S.C. § 2000e-2 (1982).

[3] 106 S. Ct. at 2404. For examples of early cases dismissing claims of sexual harassment as not contemplated by Title VII, see Corne v. Bausch and Lomb, Inc., 390 F. Supp. 161, 163-64 (D. Ariz. 1975), *vacated and remanded on other grounds*, 562 F.2d 55 (9th Cir. 1977), ("[A]n outgrowth of holding such activity [sexual advances by a supervisor to an employee, characterized by the court as 'nothing more than a personal proclivity, peculiarity or mannerism'] to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances towards another. The only sure way an employer could avoid such charges would be to have employees who were asexual"); *see also* Miller v. Bank of Am., 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd and remanded*, 600 F.2d 211 (9th Cir. 1979):

> It is conceivable, under plaintiff's theory, that flirtations of the smallest order would give rise to liability. The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions. Such being the case, it would seem wise for the courts to refrain from delving into these matters short of specific factual allegations describing an employer policy which in its application imposes or permits a consistent, as distinguished from isolated, sex-based discrimination on a definable employee group. *Id.* at 236.

[4] 106 S. Ct. at 2404.

[5] *See*, Henson v. City of Dundee, 682 F.2d 897, 908 n.18 (11th Cir. 1981).

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conduct."[6] This article reviews the recent developments in sexual harassment law and applies them to the academic arena. It also suggests how, in light of *Meritor*, colleges and universities should review their own procedures and practices for complaints of sexual harassment.

I. "Sexual Harassment" Defined

The United States Supreme Court in *Meritor* adopted the definition of sexual harassment formulated by the Equal Employment Opportunity Commission (EEOC),[7] the federal commission which enforces the Civil Rights Act of 1964,[8] in the EEOC's 1980 Guidelines on Discrimination Because of Sex.[9] The guidelines define sexual harassment as:

> [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, [both quid pro quo harassment] or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment [condition of work harassment].[10]

A. *Quid Pro Quo Harassment*

Courts began to recognize that quid pro quo sexual harassment violates Title VII in the late 1970's.[11] A single incident of harassment

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[6] See, Korf v. Ball State Univ., 726 F.2d 1222 (7th Cir. 1984); Levitt v. University of Tex. at El Paso, 759 F.2d 1224 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 599 (1985), Cockburn v. Santa Monica Community College Dist., 207 Cal. Rptr. 589, 161 Cal. App. 3d 734 (Cal. App. 1984); Naragon v. Wharton, 737 F.2d 1403 (5th Cir. 1984).

[7] *Meritor*, 106 S. Ct. at 2405.

[8] 42 U.S.C. § 2000e-5 (1982).

[9] 29 C.F.R. § 1604.11 (1986). The court's resort to EEOC guidelines is appropriate, for although the EEOC has no formal rule-making authority and its guidelines do not independently have the force and effect of law, they constitute a body of experience and informed judgment on which courts rely. General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976).

[10] 29 C.F.R. § 1604.11 (1986).

[11] See, Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) (repeated solicitations to join supervisor for social activities after hours despite repeated refusals to do so, repeated remarks sexual in nature, and repeated suggestions that if employee cooperated in a sexual affair her employment status would be enhanced constituted sexual harassment when subsequent to employee's resistance she was harassed and stripped of job duties and her job was abolished); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977) (sexual harassment found where employee had received advances at lunch

is now considered sufficient to sustain a charge against an employer.[12]

Such harassment by a supervisory employee towards a subordinate employee results in strict liability of the employer for the acts of the supervisory employee.[13] This accords with the standard of liability of Title VII, under which an employer is liable for the discriminatory acts of its supervisors, whether the employer knew, should have known, or approved of the supervisor's actions.[14]

An employee who has suffered quid pro quo harassment cannot recover damages for mental suffering or emotional damages.[15] Courts limit recovery to the actual economic damages incurred, such as back pay, lost wages and benefits, or to injunctive relief.

B. *Offensive Environment Harassment*

Bundy v. Jackson first articulated the offensive environment sexual harassment theory in 1981.[16] The court held that sexual advances by a

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from her supervisor stating sexual relations were necessary for a satisfactory working relationship, followed by threats of recrimination and physical force which, when resisted, led to the employee's transfer to an inferior position, false and adverse employment evaluations, disciplinary lay-offs and ultimately dismissal); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd and remanded sub nom.*; Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978), *aff'd on reh'g sub nom.*; Williams v. Civiletti, 487 F. Supp. 1387 (D.D.C. 1980) (supervisor sending suggestive card and making social and sexual advances to employee which when resisted led to criticism of employee and eventually her dismissal was sexual harassment); Munford v. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977) (sexual harassment found where supervisor made repeated sexual suggestions and innuendoes verbally and by leaving cartoons on employee's desk, demanded that employee share his motel room on a business trip and discharged her when she refused); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978) (sexual harassment found where a supervisor placed his arm around an employee/applicant saying she did not really understand the job requirements of travel and family sacrifices but would in time, followed by his explicit sexual invitations and an offer of an apartment if the employee would leave her husband and consent to an affair, and ending with a demand that she have an affair with him or be fired, which she was). *But see*, Walter v. KFGO Radio, 518 F. Supp. 1309 (D.N.D. 1981) (supervisor's bottom patting of employee not sexually oriented but intended as a show of support and encouragement; alleged incidents of breast touching and making an inebriated attempt to have an affair on a business trip, even if true, insufficient to establish sexual harassment when employee continued to carry out her duties and get job raises); Bouchet v. National Urban League, 730 F.2d 799 (D.C. Cir. 1984) (although evidence suggested that the supervisor was attracted to the employee and flirted with her on several occasions, it did not establish that any sexual advances or demands were made, and employee's subsequent dismissal was based on poor performance).

[12] *See, e.g.*, Downes v. Federal Aviation Administration, 775 F.2d 288, 291 (Fed. Cir. 1985), Joyner v. AAA Cooper Transp., 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd* 749 F.2d 732 (11th Cir. 1984).

[13] *Meritor*, 106 S. Ct. at 2408.

[14] *Id.*, citing Anderson v. Methodist Evangelical Hosp., 464 F.2d 723, 725 (6th Cir. 1972).

[15] *Henson*, 682 F.2d at 905.

[16] 641 F.2d 934 (D.C. Cir. 1981).

supervisor in the workplace could be sexual harassment even though the employee did not lose tangible employment benefits. Courts have debated and refined the theory of offensive or hostile working environment sexual harassment since then. However, the federal circuit courts of appeal have split on several related important issues; *Meritor* has resolved some but not all of those issues.

Before *Meritor*, the circuits were divided as to whether the theory of respondeat superior or strict liability was the required standard for determining an employer to be liable for the acts of supervisory employees in offensive environment cases. *Henson v. City of Dundee*,[17] and *Katz v. Dole*[18] were the leading federal court cases which held respondeat superior applied.

In *Henson*, a female dispatcher in the City of Dundee's police department alleged that she had received numerous demeaning sexual inquiries and advances from her police chief, that she complained of these acts to the city manager, but that no action was taken. She brought a Title VII sex discrimination action against the employer/city for the chief's actions. The Eleventh Circuit Court of Appeals held that the existence of an offensive or hostile working environment could violate Title VII of the Civil Rights Act of 1964 regardless of whether a plaintiff suffered tangible job detriment. The court relied on *Rogers v. EEOC*,[19] a hostile environment race discrimination case, as well as *Bundy*, for its decision.

The court in *Henson* established five criteria for a Title VII claim against an employer for a hostile work environment. First, the employee must belong to a group which Title VII protects.[20] This only means, in a sexual harassment case, that the employee must be either male or female. Second, the employee must have experienced sexual harassment. The employee must have experienced sexual advances, requests for sexual favors, or other verbal or physical sexual conduct which the employee did not solicit or incite and found undesirable or offensive. Third, the harassment must have been based on sex;[21] in other words,

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[17] 682 F.2d 897 (11th Cir. 1982).

[18] 709 F.2d 251 (4th Cir. 1983).

[19] 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). Rogers held that an Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele.

[20] 42 U.S.C. § 2000e-2(a) (1982).

[21] *Henson* held that in cases where a supervisor makes sexual overtures to workers of both sexes, or where the conduct complained is equally offensive to male and female workers, it is not discrimination based on sex because men and women get equal treatment. *Henson*, 682 F.2d at 904. In such cases *Henson* said the plaintiff may only have a common law remedy such as assault, battery, invasion of privacy or intentional infliction of emotional distress. *See* Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977). For a contrary view, see Howard Univ. v. Best, *infra* note 38, which held that proof that male employees are offended by harassment directed at female employees may bolster a female employee's case.

the employee would not have been harassed except for his or her sex. This criterion includes conditions which a heterosexual superior places upon a subordinate of the opposite gender, or which a homosexual superior places upon a subordinate of either gender.[22] Fourth, the harassment must have affected a "term, condition, or privilege" of employment.[23] The harassment must have been so pervasive that it altered the conditions of employment and created an abusive environment.

Henson established respondeat superior as the fifth criterion. The employee must show that the supervisor knew or should have known of the sexually hostile environment before a court can hold the employer responsible. The court reasoned that generally a supervisor gratuitously insults an employee for personal reasons and through personal means. Therefore, the supervisor acts outside the actual or apparent scope of authority conferred by the employer. *Henson* asserts that this scope of authority does not necessarily enhance or diminish the supervisor's ability to create a sexually hostile environment.[24]

Henson distinguished between an employer's liability in an offensive environment case and an employer's liability in a quid pro quo case. *Henson* recognized that in a quid pro quo case, strict liability would apply to the supervisor and the employer for sex discrimination.[25] This standard is used because the supervisor relies on the apparent or actual authority which the employer confers on him or her, such as authority to hire, fire or discipline, to extort the sexual consideration from the employee in quid pro quo cases. Thus, *Henson* pointed out, the employer should be liable for the acts of his agent, the supervisor, because at common law a master is liable for the tortious acts of his servant if the agency relationship aids the servant in accomplishing the tort.[26]

The Fourth Circuit followed *Henson* in *Katz v. Dole*.[27] Katz, a former federal air traffic controller, alleged she had been subjected to vulgar and offensive epithets by her co-workers and her supervisor on the job. Katz successfully sued the Secretary of the Department of Transportation for sex discrimination under Title VII.

In *Katz*, the court held an offensive environment actionable under Title VII and adopted *Henson*'s respondeat superior theory. It put upon the plaintiff the burden of proving that the employer had actual or constructive knowledge of the existence of the sexually hostile working

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[22] Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).

[23] The court held the state of "the psychological well being" of the employee could be such. *Henson*, 682 F.2d at 904.

[24] *Id.* at 910. One judge dissented from that position.

[25] *Id.* (citing Miller v. Bank of Am., 600 F.2d 211 (9th Cir. 1979)).

[26] RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957) (cited with approval in *Henson*, 682 F.2d 897, 910 n.21).

[27] 709 F.2d 251 (4th Cir. 1983).

environment and did not take prompt and adequate remedial action. The employer could rebut the plaintiff's case (1) by showing that the events did not take place or were isolated or genuinely trivial, or (2) by pointing to prompt remedial action reasonably calculated to end the harassment.[28]

A contrary line of cases held that strict liability rather than respondeat superior was the appropriate standard for employers in offensive environment cases. In the leading case advocating that theory, *Vinson v. Taylor*,[29] Vinson, a terminated bank employee, sued Taylor, her supervisor, and her employer/bank claiming sex discrimination under Title VII. She alleged that her supervisor asked her for sexual favors in return for her previous promotion. The district court held for the employer because Vinson was not required to grant Taylor sex for the promotion and the relationship was voluntary.[30] The circuit court reversed because the trial court had not considered a hostile working environment theory. Relying on *Bundy*,[31] the circuit court held that a woman need not prove resistance to sexual overtures in a sexual harassment case.

Relying on the EEOC guidelines on discrimination,[32] *Vinson* then held that Title VII imposes on an employer liability for a substantially discriminatory work environment.[33] It noted that the legislative history on Title VII anticipated vicarious employer accountability.[34] Thus, *Vinson* rejected the *Henson* and *Katz* theory of respondeat superior:

> To hold that an employer cannot be reached for Title VII violations unknown to him is . . . to open the door to circumvention of Title VII by the simple expedient of looking the other way, even as signs of discriminatory practice begin to gather on the horizon.[35]

The court in *Jeppsen v. Wunnicke* followed the *Vinson* approach.[36] Citing *Vinson*, the court found it unnecessary for the plaintiff to prove in a sex discrimination case under Title VII that the employer knew

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[28] The court noted in its opinion that the FAA did have a policy against sexual harassment, but that it was not effective and was known not to be effective by FAA supervisory personnel. *Id.* at 256. This decision issued an early warning that a printed policy against sexual harassment alone would not be a sufficient defense in an offensive environment case.

[29] 753 F.2d 141 (D.C. Cir. 1985), *rev'd and remanded sub nom.*, Meritor Savings Bank, FSB v. Vinson, 106 S. Ct. 2399 (1986).

[30] Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980).

[31] Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

[32] Guidelines on Discrimination Because of Sex, 29 C.F.R. §§ 1604.1-1604.11 (1984).

[33] *Vinson*, 753 F.2d at 147.

[34] *Id.* at 148-49.

[35] *Id.* at 151.

[36] 611 F. Supp. 78 (D.C. Alaska 1985).

that the supervisor had created a hostile working environment.[37] The court distinguished the result in *Henson* by noting its reliance on the district court decision in *Vinson*, and on irrelevant language in *Bundy*. The divided opinion in the courts on the issue of employer responsibility foreshadowed a definitive decision from the United States Supreme Court.[38]

II. Meritor Savings Bank, FSB v. Vinson

The United States Supreme Court issued its first decision regarding sexual harassment in *Meritor Savings Bank, FSB v. Vinson*.[39] The Court upheld the theory of offensive environment sexual harassment but left somewhat undecided the liability which an employer incurs in such cases if the harassing employee is a supervisor. Although the opinion did not make every employer automatically liable for a supervisory employee's harassment, it indicated that courts must scrutinize the employer's delegation of authority in harassment cases. As a result of *Meritor*, courts probably will hold liable an employer who broadly delegates responsibility to a supervisory employee.

Justice Rehnquist, writing the majority opinion in which four justices joined, emphasized that the plaintiff, Mechelle Vinson, whom Sidney Taylor hired to work for Meritor Savings Bank in 1974, received

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[37] *Id.* at 82.

[38] State courts have also split on the employer liability issue. For example, in Glasgow v. Georgia-Pacific, 103 Wash. 2d 401, 693 P.2d 708 (1985), female employees brought suit against their employer and others for sex discrimination and outrage, alleging that a co-worker fondled them and used abusive language on them and that they informed the plant manager who allegedly did nothing. The court held that in an hostile environment case the employee must show that the employer authorized, knew or should have known of the harassment and failed to take reasonably prompt and adequate corrective action to be held liable. The court stated that the employer may ordinarily avoid liability by taking prompt and adequate corrective action when it learns that an employee is being sexually harassed.

The opposite view was expressed in Howard Univ. v. Best, 484 A.2d 958 (D.C. App. 1984). In *Best*, a former pharmacy faculty member whose contract was not renewed sued Howard University, her dean, and other faculty members for sexual harassment, breach of contract, intentional infliction of emotional distress and defamation, alleging, inter alia, that the dean had made suggestive remarks and fondled her at an academic conference in front of her peers.

The court in *Best* rejected the *Henson* and *Katz* respondeat superior approach for employers and adopted the strict liability approach of Miller v. Bank of Am., 600 F.2d 211 (9th Cir. 1979). The court accordingly stated that upon the plaintiff's establishing a case of sexual harassment at a new trial, the jury was to be instructed that the University was to be held liable for sexual harassment. *Best*, 484 A.2d 958, 983-84. The court apparently based its decision on the fact that the Vice-President for Health Affairs at Howard did not conduct an independent review of the dean's non-renewal of Best's appointment and that his adoption of it constituted full knowledge and acceptance of the dean's actions in the eyes of the court.

[39] 106 S. Ct. 2399 (1986).

promotions based on merit. Subsequently, Taylor allegedly asked Vinson for sexual favors, which she granted about forty or fifty times. She alleged incidents of fondling and forcible rape. She never reported Taylor's behavior to bank administrators, allegedly due to fear of Taylor's reaction, and never used the bank's internal complaint procedure. The sexual activities ceased in 1977 when Vinson acquired a boyfriend. Vinson went on sick leave in 1978 and the bank later discharged her for excessive use of sick leave.[40]

Vinson then filed a Title VII sex discrimination action against the bank alleging that sexual harassment had resulted in her constructive discharge. The bank claimed her harassment was unknown to it and occurred without its consent or approval.[41]

Justice Rehnquist's opinion, relying on the EEOC Guidelines, *Rogers*, *Henson*, *Katz* and *Bundy*,[42] recognized first that an offensive sexual environment constitutes sexual harassment under Title VII. Rehnquist rejected the need for an economic effect for a sexual harassment claim. However, again citing *Rogers* and *Henson*, he stated that the harassment must be severe and pervasive.[43]

Justice Rehnquist then stated that the correct inquiry in a sexual harassment case is not whether harassment is voluntary, as the *Vinson* circuit court decision had found, but whether it is unwelcome. The Court determined that evidence of a plaintiff's sexually provocative speech and dress would be relevant to the issue of "unwelcomeness."[44]

Addressing the crucial issue of an employer's liability, Justice Rehnquist provided no definitive principle, stating only that employers are not automatically liable for sexual harassment by supervisors. Rather, Rehnquist wrote, the supervisor must first be acting as the employer's agent. Rehnquist found persuasive in this regard Congress's use in Title VII of the term "agent" in defining "employer." This usage evidenced an intent to place some limits on the extent to which employers should

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[40] *Id.* at 2402.

[41] *Id.* at 2403.

[42] *Id.* at 2406.

[43] *Id.*

[44] *Id.* at 2407. *But see*, Priest v. Rotary, 98 F.R.D. 755, 32 Empl. Prac. Dec. (CCH) ¶ 33,864, 73 A.L.R. FED. 736 (N.D. Cal. 1983), in which the employer of a bar sought evidence of his waitress'/employee's sexual history to be used to defend against her allegation of his sexual harassment of her. The court held that evidence of a plaintiff's sexual history would be inadmissible to prove her propensity to act in conformity therewith. The court also rejected that such evidence could be used to show her "habit" of sexual activities. The court also found insufficient evidence that there was a "motive" involved which would allow disclosure of such information where the only motive alleged was a desire for retaliation by the employee against the employer and a desire for economic gain. The court said the purpose of the discovery request was to harass, intimidate and discourage the plaintiff in her efforts to prosecute the case and therefore denied the discovery request.

be liable for employees' acts. He discussed with apparent approval the EEOC's conclusion that where an employee-supervisor exercises authority actually delegated by the employer to make or threaten to make employment decisions affecting subordinates, the employee's actions may be imputed to the employer.[45] Thus, *Meritor* implies that employers are not subject to automatic liability if they have not delegated such authority to their employees. Such situations, however, are more likely to be the exception rather than the rule.

Meritor appears to rely on four elements for a prima facie case of sexual harassment. First, the supervisor made sexual advances. Second, the sexual advances were unwelcome. Third, the advances were sufficiently pervasive to constitute a condition of employment. Finally, the advances were so pervasive and continuous that the employer must have been conscious of them or the harassing employee had authority to make decisions affecting the employment status of the harassed employee.[46]

Justice Rehnquist noted that Vinson's failure to use the bank's grievance procedure did not necessarily insulate the bank from liability.[47] This conclusion seems based on the fact that the bank's policy barred discrimination generally and did not necessarily alert Vinson of the bank's interest in correcting sexual harassment. Further, Rehnquist indicated his dislike for the bank's policy because it required Vinson to complain first to Taylor, her supervisor. Thus, he implied that the decision might have been different if the procedure better informed employees that the bank would investigate and resolve sexual harassment complaints and if that procedure encouraged victims to come forward.[48]

Justice Marshall, joined in a concurring opinion by three justices, addressed only the issue of employer liability.[49] Justice Marshall saw no reason to distinguish an employer's liability in an offensive environment sexual harassment situation from that in any other case of sex discrimination.[50] Marshall felt that a failure to distinguish such liability would impose no additional hardship on an employer because a plaintiff can receive only injunctive relief and not money damages in an offensive environment case. Title VII's requirement that a plaintiff file a complaint with the EEOC provides the employer an opportunity to correct an unperceived or unknown problem before any injunction.[51]

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[45] *Meritor*, 106 S. Ct. at 2407-08.

[46] *Id.* at 2408.

[47] *Id.* at 2408-09.

[48] *Id.*

[49] Interestingly, Justice Stevens saw no inconsistencies between Rehnquist's and Marshall's opinions and agreed with both. *Id.* at 2411 (Stevens, J., concurring).

[50] *Id.*

[51] *Id.*

If the plaintiff sought back pay, for example under a constructive discharge theory, the employee's failure to use an employer's internal procedure might, in Marshall's view, be a factor regarding the remedies but not regarding the employer's liability. In such a situation, Justice Marshall said a court might be reluctant to find that the employer's actions constituted a constructive discharge or to hold that back pay should be awarded.[52]

Although *Meritor* did not explicitly determine an employer's liability in offensive environment cases, the court did alert employers that their delegation to supervisors of authority affecting the employment status of employees may make those employers strictly liable for the sexual harassment inflicted by such supervisors. Employers, therefore, must promulgate a procedure known to employees as one for receiving and addressing complaints of sexual harassment. The procedure must contain sufficient flexibility to allow and encourage a harassed employee to approach management with a complaint, not only at the direct supervisory level, but also at any level chosen by the employee. Additional features of this procedure which are designed to encourage employees to file sexual harassment complaints will probably be viewed favorably by a court and may reduce the employer's potential for liability.

III. Other Significant Developments in Sexual Harassment Law

A. *Damages Recoverable*

It is now clear that a plaintiff may recover only limited damages under an offensive environment theory in federal court.[53] The plaintiff cannot recover for mental suffering,[54] for emotional distress,[55] or for lost wages.[56] However, the plaintiff may be able to recover attorney's fees because a court can award nominal damages.[57]

B. *Actionable Conduct*

Not all workplace conduct which may be described as "harassment" is actionable.[58] *Vinson* cited with approval the *Henson* test that the treatment must be "sufficiently severe or pervasive . . . to alter the conditions of [the victim's] employment and create an abusive working

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[52] *Id.*

[53] *Id.*

[54] Bundy v. Jackson, 641 F.2d at 934, 946 n.12; Henson v. City of Dundee, 682 F.2d at 905.

[55] *Bundy*, 641 F.2d at 946 n.12. *Henson*, 682 F.2d at 905.

[56] Scott v. Sears, Roebuck & Co., 605 F. Supp. 1047, 1054 (N.D. Ill. 1985).

[57] *Henson*, 682 F.2d at 905.

[58] *Meritor*, 106 S. Ct. at 2406.

environment."[59] Case law now provides guidance as to what constitutes such conduct. If sexual insults and demeaning propositions have adversely affected the work environment, such conduct may be harassment.[60] However, the utterance of a sexual epithet which merely engenders offensive feelings in an employee does not violate Title VII.[61] As one court stated, "Title VII is not a clean language act, and it does not require employers to extirpate all signs of centuries-old prejudices."[62] Isolated incidents, flirting and inferential characterizations of comments as propositions do not establish sexual harassment.[63] No specific number of incidents and no specific level of egregiousness can be set forth as a measure of sexual harassment.[64]

However, that each incident may not be individually actionable does not preclude sexual harassment.[65] The test of whether the plaintiff has met his or her burden of proof

> is essentially a balancing test, in which the trier of fact should consider, *inter alia*, the amount and nature of the conduct, the plaintiff's response to such conduct, and the relationship between the harassing party and the plaintiff. In other words, the totality of the circumstances must be considered.[66]

C. *Adequacy of Corrective Action*

Courts have been less specific regarding what corrective action by an employer will remedy a sexual harassment complaint. In *Barrett v. Omaha National Bank*,[67] a bank employee complained to her supervisor that a co-worker discussed sexual activity with her and touched her in an offensive manner. The bank reprimanded the co-worker, placed him on probation for ninety days and warned him that any further misconduct would result in his discharge. The employee subsequently left the bank and brought an action for sexual harassment against the employer, claiming that the action taken by the employer against the co-worker was insufficient. The court found that the bank had acted immediately and appropriately and held that the bank was not required to fire the co-worker as a remedy for sexual harassment.

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[59] *Henson*, 682 F.2d at 904.
[60] *Bundy*, 641 F.2d at 943.
[61] *Henson*, 682 F.2d at 904.
[62] *Katz*, 709 F.2d at 256.
[63] *Scott*, 605 F. Supp. at 1053-54.
[64] *Best*, 484 A.2d at 980.
[65] *Id.*
[66] *Id.* at 981.
[67] 726 F.2d 426 (8th Cir. 1984).

IV. Alternative Theories Used to Recover Damages For Harassment

A. *State Tort Actions*

Because a plaintiff may not recover monetary damages for mental anguish and emotional distress in federal courts for sexual harassment claims, many plaintiffs seek remedy under state laws providing monetary damages for intentional infliction of emotional distress. Judicial analysis in such cases has varied, partially because the elements of this tort vary from state to state.

For example, *Howard University v. Best* held the creation of a hostile working environment sufficient to constitute a prima facie case of intentional infliction of emotional distress.[68] The court held that a jury could find that the intentional infliction of emotional distress arose out of and in the course of employment. The court stressed that the sexually hostile acts of the dean towards the faculty member occurred during faculty, administrative or other professional meetings which both attended in their professional capacities. Thus, the court held the University liable for the tort of outrage.[69]

In *Glasgow v. Georgia-Pacific*[70] an employee was subjected to fondling by a co-worker and the supervisory employee failed to take action despite complaints. The court refused to address whether the tort of outrage was committed because of a judgment for the plaintiff on her sexual harassment claim. In *Glasgow*, the court did state, however, that the strict limiting parameters of the tort of outrage remained.[71]

B. *The Fourteenth Amendment Equal Protection Clause*

The court in *Estate of Scott by Scott v. deLeon*[72] approved an alternate theory of damages: denial of equal protection under the fourteenth amendment by allowing harassing incidents to occur. In *Scott*, the personal representative of a pharmaceutical assistant at the University of Michigan alleged that the assistant's supervisor violated the equal protection clause by sexually harassing the assistant through letters, notes, and threats aimed at coercing her into sexual relations. The assistant allegedly complained to three university administrators about these incidents but nothing was done because she did not file a formal complaint with university personnel. The assistant died of a

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[68] *Best*, 484 A.2d at 986. Indeed, the court held that the standard for showing emotional damages as a result of sexual harassment should be lower than that which is required by a plaintiff to prove intentional infliction of emotional distress because the higher standard of proof would not serve the broad purpose of antidiscrimination acts. *Id.* at 980 n.26.

[69] *Id.* at 987.

[70] 103 Wash.2d at 408, 693 P.2d at 708 (1985).

[71] *Id.*

[72] 603 F. Supp. 1328 (E.D. Mich. 1985).

drug overdose, allegedly related to the harassment. The court found that sexual harassment could violate rights protected by the equal protection clause because harassment was "the sort of invidious gender discrimination that the equal protection clause forbade."[73]

The Court of Appeals for the Seventh Circuit in *Bohen v. City of East Chicago*[74] recently approved the use of the equal protection clause to support a claim of sexual harassment. In *Bohen*, a female fire dispatcher alleged that she had suffered numerous incidents of harassment by supervisory personnel and that these incidents represented the accepted practice of the department. In fact, the employee had been warned of the sexually oppressive working conditions in her hiring interview.

The court held that under the equal protection clause the employee had only to establish intentional discrimination, and not that the harassment altered the conditions of employment, a requirement under Title VII. Moreover, the employee could show intentional discrimination by the employer's conscious failure to protect her from the abusive conditions of employment created by other employees. Although it held that the employer would have a good defense if it could show the employee suffered harassment because of personal factors and not because she was a woman, or that the harassment was justified or had a legitimate business purpose, the court, finding no such conditions, held in favor of the fire dispatcher.

C. *Title IX of the Education Amendments of 1972*

Another way to seek damages for sexual harassment, and one that enjoyed an initial popularity, is Title IX of the Education Amendments of 1972.[75] *Alexander v. Yale University* recognized a cause of action by a student for sexual harassment under Title IX.[76] In *Alexander*, a student alleged that a poor grade resulted from her rejection of a professor's offer of a grade of "A" in return for sexual favors.[77] Citing *Barnes v. Costle*,[78] the court stated that such behavior constitutes sex discrimination in education just as it does in employment.

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[73] *Id.* at 1332.

[74] 799 F.2d 1180 (1986).

[75] 20 U.S.C. §§ 1681-1686 (1982). In pertinent part Title IX provides that "[no] person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a).

[76] 459 F. Supp. 1, 3-4 (D.C. Conn. 1977).

[77] *Id.*

[78] *Id.* at 4. The court was reluctant to endorse an offensive environment theory of discrimination. A male professor's claim that his teaching effort had been hampered by an "atmosphere of distrust" of male professors due to sexual advances by faculty to students was dismissed by court saying, "[n]o judicial enforcement of Title IX could properly extend to such imponderables as atmosphere or vicariously experienced wrong, and the [claim is] untenable on [its] face." *Id.* at 3.

Subsequently, Congress expanded Title IX to allow actions for discrimination in employment at educational institutions.[79] However, some courts have limited its expansion into employment matters, applying it only when the plaintiff has no recourse to a remedial statute such as Title VII.[80] Furthermore, *Grove City College v. Bell*[81] limited Title IX's enforceability to those programs or activities which receive direct federal financial assistance.

At least one court has used this limitation to reject a claim of sexual harassment brought pursuant to Title IX. In *Walters v. President and Fellows of Harvard College*,[82] an employee in the Buildings and Grounds Department at Harvard, citing, inter alia, Title IX as a basis for her claims, alleged that sexual harassment had led her to quit her job. The court ruled that although Title IX prohibits discrimination in employment, such employment must be under an "education program or activity." The employment, said the court, must be "something more directly related to the delivery of educational services than the purely custodial services provided by the Buildings and Grounds Department."[83]

V. Denial of Sexual Harassment Claims: Effect of State Worker's Compensation Statutes

Employers are increasingly using worker's compensation statutes to dismiss sexual harassment charges, claiming that such statutes have exclusive jurisdiction over claims for emotional distress due to sexual harassment. This approach succeeded in *Miller v. Lindenwood Female College*.[84] The court found that the college was not liable for the infliction of emotional distress which was due to the sexual harassment of the employee by the college's agent because the employee's relief lay solely under Missouri's Workmen's Compensation Act. The court found that intentional acts of fellow employees which caused emotional distress fell within the Act's statutory definition of "accident" for which the Act provided recovery.[85]

Likewise, in *Zabkowicz v. West Bend Co.*,[86] the court found that plaintiff's remedy for alleged emotional trauma due to sexual harassment lay solely under Wisconsin's Worker's Compensation Act. The

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[79] North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982).

[80] *See, e.g.*, Storey v. Board of Regents of the Univ. of Wis. System, 600 F. Supp. 838 (W.D. Wis. 1985).

[81] 104 S. Ct. 1211 (1984).

[82] 601 F. Supp. 867 (D. Mass. 1985).

[83] *Id.* at 869.

[84] 616 F. Supp. 860 (E.D. Mo. 1985).

[85] The court further found that, if the agent was working as an independent agent for the college, the college would also not be liable to the employee. *Id.* at 861.

[86] 40 Empl. Prac. Dec. (CCH) ¶ 36,089 (7th Cir. 1986).

court pointed out that Zabkowicz had not alleged that West Bend's employees had subjected her to intentional sexual harassment, but only that West Bend had failed to prevent the sexual harassment. Furthermore, the worker's compensation statute applied to accidental acts. Zabkowicz had failed to contend that her emotional trauma was expected or foreseen, and therefore, the court concluded, it was "accidental" and covered exclusively by the worker's compensation act. Although its unusual fact situation may limit its impact, this decision demonstrates the importance of careful pleading in sexual harassment cases.

VI. Adequacy of Damages Received

An employer unsuccessful in defending a claim of sexual harassment must provide appropriate damages to the victim. *Micari v. Mann*[87] provides some guidance on awards for damages. In *Micari*, plaintiff students engaged in sexual acts with their acting teacher on his advice that such acts would release their inhibitions and improve their acting skills. They subsequently brought actions for assault, battery and intentional infliction of emotional distress against the teacher because New York state law did not provide a cause of action for sexual harassment in its education code. Each plaintiff received only $2,000 and no punitive damages from the jury despite the fact that the jury indicated in a note that it hoped that its decision would "serve as a future deterrent in sexual abuse and harassment behavior of teacher against student."[88] The court held the failure to award punitive damages grounds for a new trial on that issue unless the defendant immediately granted $5,000 in punitive damages to each plaintiff.

VII. Sexual Harassment as Grounds for Discipline in Academic Cases

Courts generally deal severely with sexual harassment in the traditional workplace, but their reaction is even stronger when confronted with sexual harassment in the academic setting. Courts appear willing to defer to the academic judgment of college administrators in their attempts to discipline offending faculty. The courts regard the college's protection of students from such abuse as an important duty with concomitant responsibility and liability such as colleges have not seen since the demise of in loco parentis.

For example, in *Cockburn v. Santa Monica Community College District*,[89] a terminated instructor and lab technician alleged that the college's personnel commission's decision dismissing him was exces-

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[87] 481 N.Y.S.2d 967 (1984).

[88] *Id.* at 969.

[89] 161 Cal. App. 3d 734, 207 Cal. Rptr. 589 (Ct. App. 2d Dist. 1984).

sive. The instructor had admitted that he grabbed and kissed a student employee. The college had received four prior complaints against the instructor alleging lewd comments and fondling. The instructor denied these allegations. The court found, despite a psychologist's opinion that the instructor could be rehabilitated and perform his duties, that the dismissal was not excessive. The court stressed the commission's "grave responsibility . . . to the [college] and their personnel, the professors, instructors and students they embrace, and to the general public."[90]

Korf v. Ball State University[91] reflects a similar distaste for such behavior toward a student. In *Korf*, a university hearing committee found a professor's sexual advances to a male student unethical and ultimately recommended his dismissal. The professor claimed that the dismissal violated his constitutional rights to due process because he had inadequate warning as to the results of his conduct since his was Ball State's first dismissal for unethical conduct. The court said that "[c]ommon sense, reason and good judgment" adequately warned him of such a result.[92]

Likewise, in *Levitt v. University of Texas at El Paso*,[93] a court expressed its displeasure with sexual harassment by a professor. In *Levitt*, the university terminated a tenured professor of chemistry due to several complaints of sexual harassment from female students. The professor claimed that the University's hearing on the charges violated his rights of due process. The court held that even if the University

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[90] *Id.* at 597. *But see* Brown v. California State Personnel Bd., 166 Cal. App. 3d 1151, 213 Cal. Rptr. 53 (Ct. App. 3d Dist. 1985). Brown, a criminal law associate professor, brought an action to be reinstated in a teaching position at California State University at Sacramento (CSUS). There had been a four year delay by the college in bringing charges against Brown. The charges alleged a pattern and practice of discrimination by Brown against five students. The court found the University's excuse for the delay, the female students' original reluctance to come forward as witnesses against Brown, unpersuasive noting "[t]he disposition of the victim may be of interest in the exercise of discretion [whether] to prosecute or not to prosecute," but that "when CSUS made up its mind to act it was able to persuade the formerly reluctant victims to participate." *Brown*, 213 Cal. Rptr. at 60.

The court then found that the four year delay had acted as a prejudice to Brown, even though all witnesses could clearly remember the events, because of the potential loss by Brown of four years of his efforts in an academic position at the outset of his academic career. The court found that there was a considerable change of position in reliance on the status quo which worked a sufficient prejudice to transform the CSUS's unreasonable delay in the case to laches. The court dismissed four of the charges of sexual harassment because of laches, leaving one allegation of a sexual advance without a threat of retaliation by Brown. The court found that the single remaining charge insufficiently established a "pattern or practice" of behavior as had been alleged and, as CSUS had no rule against student/faculty dating, Brown was to be reinstated.

[91] 726 F.2d 1222 (7th Cir. 1984).

[92] *Id.* at 1227.

[93] 759 F.2d 1224 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 599 (1986).

did not follow its own rules precisely, the University did not deny the professor any constitutionally guaranteed due process.[94]

Courts further indicate their dislike for sexual harassment when a faculty member challenges a disciplinary action on the grounds that the student consented to the sexual encounter. Such an argument carried little weight in *Korf*.[95] A student's consent to a homosexual relationship with a professor, said the court, is irrelevant when the charge against the professor is "exploiting students for his private advantage."[96] The court, judging the conduct in the context of a professor-student relationship, said: "University professors occupy an important place in our society and have concomitant ethical obligations." The court cited the American Association of University Professors Statement on Professional Ethics which says: "[The professor] demonstrates respect for the student as an individual and adheres to his proper role as an intellectual guide and counselor . . . ."[97]

So too in *Naragon v. Wharton*,[98] the consent of a student to a lesbian relationship with a music teaching assistant did not prevent the court's approval of the university's decision to change the assistant's duties. The court held that the university did not violate the assistant's constitutional rights to equal protection when it did not reinstate her to the same teaching position, but reappointed her with the same compensation to other duties. The court accepted the reasoning of the university's educators that intimacy between teacher and student is a breach of professional ethics. The court noted that such intimacy undermines effectiveness and the proper position of a teacher because of other students' perception of the teacher and because of the teacher's "position of trust to instruct the student."[99]

The court's reasoning is persuasive. Although a student may consent to a relationship with the teacher, the relationship might place other students at a disadvantage and result in unequal treatment should the professor favor the consenting student in class or in related academic activities and evaluations.

Conclusion

Sexual harassment cases, whether arising as quid pro quo situations or offensive environment ones, are now unquestionably valid causes of

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[94] *Id.* at 1230. The court did note that the professor might have had a breach of contract action or one arising under state law for the failure of the university to follow its own rules in his termination, but no such causes of action had been alleged.

[95] *Korf*, 726 F.2d at 1227.

[96] *Id.*

[97] *Id.*

[98] 737 F.2d 1403 (5th Cir. 1984).

[99] *Id.* at 1405. One judge dissented from the majority opinion noting that a previous heterosexual relationship in the music department had gone unpunished and therefore he felt there was a potential violation of equal protection in that the faculty member was being treated differently because of her sexual proclivities.

action under Title VII of the Civil Rights Act of 1964 and under state discrimination laws. Creative litigants are increasingly seeking alternative state remedies to expand the type of damages recoverable. Strict liability for employers technically has not yet been applied in offensive environment cases. However, strict liability is applied in quid pro quo harassment situations and probably would be applied in any offensive environment case where the offending employee is a supervisor acting as an agent of the employer at the time of the harassment.

Colleges and universities should prepare themselves for a possible expansion of the offensive environment theory into the academic area. Claims that a professors' conduct can create environments offensive to their students will likely increase. The limited case law in this area is dated and perhaps ripe for review.

Supervisors and faculty may be aware of the more obvious forms of prohibited quid pro quo harassment. After *Meritor*, however, they probably need to be educated about the more subtle forms of sexual harassment which create an offensive environment, especially since the EEOC and plaintiffs' counsel will probably scrutinize this area in the future. Educational employers should therefore create and widely promulgate among their employees and students policies and procedures specifically directed towards elimination of sexual harassment. The employers should design those procedures to encourage their employees and students to come forward with complaints and grievances in order to protect employees and students from sexual harassment and to limit educational institutions' liability in sexual harassment cases.

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"The Supreme Court -- Leading Cases"
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3. Sexual Harassment — Hostile Work Environment. — Sexual harassment in the workplace is an abuse of power most often directed against women.[1] Since 1976, when a federal court first recognized sexual harassment as a cause of action under title VII of the Civil

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[63] *See, e.g.*, Whitman, *supra* note 38, at 42–47 (discussing judicial and scholarly ambivalence about damage remedies for constitutional torts); *cf.* Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. CAL. L. REV. 1322, 1370 (1976) (summarizing a broad range of criticisms of federal common law interpreting § 1983).

[64] The Court noted in *Carey*, "We agree with Mr. Justice Harlan that 'the experience of judges in dealing with private [tort] claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of [constitutional] rights.'" 435 U.S. at 259 (quoting Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 409 (1971)). With proper judicial guidance, juries may properly determine the compensation necessary to redress intangible injuries suffered as a result of constitutional violations, without speculating on historical and societal factors unrelated to the plaintiff's actual loss.

[1] Men *may* be harassed by women and by other men, and women *may* be harassed by other women, but because of the distribution of power in our society, most harassment is of women by men. *See* V. NIEVA & B. GUTEK, WOMEN AND WORK: A PSYCHOLOGICAL PERSPECTIVE 63 (1981). This Comment will also assume that the harassment under consideration involves a supervisor and a subordinate rather than two coworkers.

Rights Act of 1964,[2] the courts have permitted plaintiffs two separate avenues of legal attack. Under one, the "quid pro quo" approach, the plaintiff must show that her supervisor conditioned the granting or denial of economic benefits upon the receipt of sexual favors.[3] Under the second, the "hostile environment" approach, the plaintiff need not demonstrate such economic reprisal, but rather that she was forced to suffer "sexually stereotyped insults and demeaning propositions" in an environment pervaded by hostile sexual innuendo and behavior.[4] Last Term, in *Meritor Savings Bank, FSB v. Vinson*,[5] the Supreme Court firmly condemned both forms of sexual harassment in a unanimous decision upholding the extension of title VII to embrace claims premised on either the quid pro quo or the hostile environment approach. At the same time, however, a majority of the Court undermined the strength of this broad reading with its holdings on two related issues. First, it held that employers in hostile environment cases are not strictly liable for the harassment perpetrated by their supervisors. Second, it held that evidence about a plaintiff's speech and dress is "obviously relevant" to a determination of whether the alleged sexual advances were unwelcome.[6] In declining to apply strict liability, the Court abandoned its most effective weapon for halting sexual harassment; in admitting evidence about a plaintiff's speech and dress, it suggested its adherence to a stereotypical — and increasingly challenged — view of women's sexuality.[7]

From September 1974 to November 1978, Mechelle Vinson worked for Capital City Federal Savings and Loan Association (the predecessor to Meritor Savings Bank).[8] In September 1978, she brought suit in federal district court, claiming that she had been sexually harassed for over two years by her supervisor, Sidney Taylor. Vinson testified that in addition to forcing her to have sex with him during and after banking hours, Taylor fondled her breasts and buttocks, followed her into the women's bathroom, and exposed himself to her during work hours.[9] Taylor denied that any sexual relations or misconduct had

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[2] *See* Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978). The relevant part of title VII states:

> It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a)(1) (1982 & Supp. 1985).

[3] *See, e.g.*, Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

[4] *See, e.g.*, Bundy v. Jackson, 641 F.2d 934, 944 (D.C. Cir. 1981).

[5] 106 S. Ct. 2399 (1986).

[6] *Id.* at 2407.

[7] *See infra* p. 285.

[8] *See* Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 38 (D.D.C. 1980).

[9] *See id.* Vinson testified that on one occasion Taylor raped her so brutally that she experienced serious vaginal bleeding and was forced to seek medical attention. *See id.*

ever taken place.[10] The district court did not resolve this conflicting testimony; it simply rejected the claim of sexual harassment because Vinson admitted that she was not subjected to a quid pro quo demand.[11] The court of appeals reversed and remanded the case, directing the district court to use the hostile environment approach to determine whether the offenses, if they occurred, constituted sexual harassment.[12]

The Supreme Court affirmed unanimously.[13] In his opinion for the Court, Justice Rehnquist agreed with the court of appeals that sexual harassment need not result in an economic effect on the complainant's employment in order to create a cause of action under title VII. Rejecting the bank's assertion that sexual harassment cases should focus on the "tangible, economic barriers erected by discrimination,"[14] he asserted that the phrase "'terms, conditions, or privileges of employment'" encompasses a wide range of disparate treatment in employment including, but not limited to, economic discrimination.[15] He further stated that in according the appropriate deference to the guidelines of the Equal Employment Opportunity Commission (EEOC),[16] the Court should hold that "sexual misconduct constitutes prohibited 'sexual harassment,' whether or not it is directly linked to the grant or denial of an economic *quid pro quo*."[17] The guidelines make clear, he noted, that sexual harassment means unwelcome sexual advances where "'such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'"[18] He concluded by observing that courts have applied the hostile environment theory of discrimination to find title VII violations when employees have been forced to endure a torrent of racial, ethnic, or religious abuse on the job.[19] "Nothing in Title VII," Justice Rehnquist rea-

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[10] *See id.* at 39.

[11] *See id.* at 38, 41.

[12] *See* Vinson v. Taylor, 753 F.2d 141, 144–45 (D.C. Cir. 1985).

[13] *See* 106 S. Ct. at 2402. Justice Rehnquist delivered the opinion of the Court, in which Chief Justice Burger and Justices White, Powell, Stevens, and O'Connor joined. Justice Stevens filed a concurring opinion. Justice Marshall filed an opinion concurring in the judgment, in which Justices Brennan, Blackmun, and Stevens joined.

[14] *Id.* at 2404.

[15] *Id.* at 2404 (quoting title VII, 42 U.S.C. § 2000e-2(a)(1) (1982 & Supp. 1985)).

[16] A plaintiff must begin her title VII action by lodging a complaint with the EEOC. *See infra* p. 282.

[17] 106 S. Ct. at 2405.

[18] *Id.* (quoting EEOC guidelines, 29 C.F.R. § 1604.11(a)(3) (1985)).

[19] *See* Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (articulating for the first time the hostile environment theory and applying it in a case of racial discrimination); Compston v. Borden, Inc., 424 F. Supp. 157, 160–61 (S.D. Ohio 1976) (holding that a supervisor's verbal abuse that demeaned plaintiff's religious background and views violated title VII). A claim that a hostile environment exists in

soned, "suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited."[20]

Justice Rehnquist next described the contours of a valid claim of sexual harassment. The district court had ruled that "[i]f the plaintiff and Taylor did engage in [a] . . . sexual relationship . . . , that relationship was a voluntary one by plaintiff."[21] Justice Rehnquist disagreed with the use of the term "voluntary," however, stating that "[t]he gravamen of any sexual harassment claim is . . . whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."[22] Nevertheless, Justice Rehnquist declined to follow the court of appeals in establishing a per se rule against the admissibility of evidence concerning a plaintiff's speech and dress. He reasoned that although "'voluntariness' in the sense of consent is not a defense to such a claim," a complainant's "sexually provocative speech or dress . . . is obviously relevant" to a determination of whether he or she found particular sexual advances unwelcome.[23]

The final question addressed by the Court was whether an employer should be held liable for a supervisor's behavior even if the employer neither knew nor reasonably should have known of the alleged misconduct. Adopting the position put forward by the EEOC in its amicus brief, Justice Rehnquist suggested that an employer should be held strictly liable in cases of quid pro quo harassment, but something less than strictly liable in hostile environment situations.[24] Without determining the exact nature of this less stringent standard, Justice Rehnquist went on to qualify it, warning that the "absence of notice to an employer does not necessarily insulate that employer from liability."[25]

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any of these contexts requires the plaintiff to establish that he or she was subjected to severe and pervasive abuse. *See* Downes v. F.A.A., 775 F.2d 288, 292–93 (Fed. Cir. 1985) (finding behavior and remarks of a sexual nature too trivial to constitute a pattern of sexual harassment).

[20] 106 S. Ct. at 2405 (emphasis in original).

[21] Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 42 (D.D.C. 1980).

[22] 106 S. Ct. at 2406.

[23] *Id.* at 2407.

[24] *See id.* at 2407–08 (citing Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 22, 26, *Meritor* (No. 84-1979)). The EEOC position in its amicus brief conflicts with its own guidelines, which hold an employer "responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence." 29 C.F.R. § 1604.11(c) (1985); *see* 106 S. Ct. at 2408, 2409–10 (Marshall, J., concurring in the judgment) (noting the tension between the two EEOC positions).

[25] 106 S. Ct. at 2408 (citation omitted). Justice Rehnquist rejected the bank's contention that the existence of a grievance procedure and Vinson's failure to invoke that procedure should have absolved it of responsibility. *See id.* at 2408–09. In fact, the bank's procedure was not a sexual harassment procedure but one designed to enable workers to bring complaints about

Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, concurred in the Court's holding with respect to hostile environment discrimination under title VII, but wrote separately on the issue of employer liability. He rejected the Court's argument that different standards of employer liability should govern the two types of sexual harassment. Because "[a]n employer can act only through individual supervisors and employees," he asserted, the acts of supervisory employees have always been imputed to the employer.[26] Justice Marshall reasoned that if one accepts the premise that sexual harassment having economic ramifications should give rise to strict liability, then reducing the liability when sexual harassment is characterized by a hostile work environment is "untenable," because, in either case, "it is the authority vested in the supervisor by the employer that enables him to commit the wrong."[27]

The *Meritor* decision should have held employers strictly liable for *all* sexual harassment perpetrated by their supervising employees. Only this firm rule — and nothing less — will prod employers into developing effective grievance procedures.[28] And, as Justice Marshall suggested, there is no reason to maintain the dichotomy between liability for quid pro quo and hostile environment harassment.[29] Jus-

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discrimination in general. For Vinson to use it, she would have had to initiate a complaint with her immediate supervisor, Sidney Taylor. *See id.* at 2409.

[26] *Id.* at 2410 (Marshall, J., concurring in the judgment) (footnote omitted).

[27] *Id.* at 2410, 2411.

[28] By holding employers responsible for all sexual harassment at their workplaces, strict liability would encourage harassed women to initiate a greater number of complaints than does the vague standard set forth in *Meritor*. Employers would prefer to prevent the filing of such claims, in part because they are worried about the financial implications of an eventual court judgment against them, *see infra* note 40, but primarily because they would prefer to retain control over sexual harassment grievances and prevent the expenditure of time and money that even the simplest EEOC proceeding requires. *See* Brief of Respondent at 31, *Meritor* (No. 84-1979) ("The employer is in the best position to enforce a minimal standard of human dignity by power of position. Liability provides an incentive to do so.") (citations omitted); *see also* Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L. REV. 345, 379, 386–87 (1980) (arguing that the employer is in the best financial position to absorb the costs of discrimination).

[29] One reason that the Court relaxed the standard of employer liability in hostile environment cases may be that it deemed the economic harm of quid pro quo harassment more serious than the psychological harm of hostile environment harassment. Yet this distinction is artificial, because *all* harassment has economic ramifications. *See* Taub, *supra* note 28, at 361; *see also* Crull, *Sexual Harassment and Women's Health*, in DOUBLE EXPOSURE 100, 107–12 (W. Chavkin ed. 1984) (arguing that sexual harassment causes women such stress that their productivity declines). The Court should have recognized the separation of the two forms of abuse only to aid in identifying instances of sexual harassment. To take the further step of assigning one level of liability to quid pro quo harassment and another to hostile environment harassment is wrong: from the perspective of the victim, *both* situations are so egregious that they warrant strict liability. Furthermore, as the case of constructive discharge illustrates, *see infra* note 40, the two types of harassment often arise out of the same fact situation. *Compare* Henson v. City of Dundee, 682 F.2d 897, 907–08 (11th Cir. 1982) (analyzing constructive termination as quid

tice Rehnquist offered a weak justification for doing so. He indicated that he was abiding by congressional intent, noting that "Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."[30] Yet not only is the legislative history of title VII silent on the matter,[31] but the courts, in construing the term "agent" to include supervisory employees, have consistently ruled that a supervisor who subjects a subordinate to discriminatory treatment causes his or her employer to violate title VII irrespective of whether that employer knew of the abuse or promulgated explicit policies against it.[32] Furthermore, speculation about congressional intent can lead to another conclusion that is equally plausible although completely contrary to that reached by the Court — namely, that Congress included the term "agent" in title VII in order to make clear that corporations and other institutions should not be able to avoid responsibility by hiding within the "largeness" of their bureaucracies.[33]

Other than Justice Rehnquist's reading of congressional intent, the only justification for the Court's application of a less stringent level of liability in hostile environment as compared with quid pro quo cases comes from its implicit endorsement of the view put forward in *Henson v. City of Dundee*.[34] In *Henson*, the Eleventh Circuit explained a similar decision weakening the standard of employer liability

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pro quo harassment), *with* Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. (BNA) 1627, 1631 (W.D. Okla. 1980) (analyzing constructive termination as hostile environment harassment).

[30] 106 S. Ct. at 2408 (quoting 42 U.S.C. § 2000e(b) (1982 & Supp. 1985)). The relevant part of title VII reads: "The term 'employer' means a person engaged in an industry affecting commerce . . . and any agent of such a person . . . ." 42 U.S.C. § 2000e(b) (1982 & Supp. 1985). Justice Rehnquist seemed to be allowing for the limited application of common law agency principles to this section of title VII. These principles provide for limitations on employer liability in a variety of situations. *But see* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) (MacKinnon, J., concurring) (arguing that because the common law would impute *no* liability to an employer for the acts of his agents, the courts must look to the wording and policy of the legislation).

[31] *See* Vinson v. Taylor, 753 F.2d 141, 148 (D.C. Cir. 1985); *Barnes*, 561 F.2d at 998 (MacKinnon, J., concurring).

[32] *See* 106 S. Ct. at 2410 (Marshall, J., concurring in the judgment) (citing Horn v. Duke Homes, 755 F.2d 599, 605–06 (7th Cir. 1985); *Vinson*, 753 F.2d at 149–52; Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 80–81 (3d Cir. 1983); Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979); Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977); Young v. Southwestern Savings & Loan Ass'n, 509 F.2d 140, 144–45 (5th Cir. 1975); Anderson v. Methodist Evangelical Hosp., Inc., 464 F.2d 723, 725 (6th Cir. 1972)).

[33] One court of appeals, confronted with the argument that the employer company must not be held responsible for sexual harassment of which it was not notified, responded that such "reification of the 'company' invites an ill-advised descent into the world of legal fiction. The 'company' is a legal form [that] can 'act' only through its duly-appointed agents." *Horn*, 755 F.2d at 604–05.

[34] 682 F.2d 897 (11th Cir. 1982).

by asserting that unlike the supervisor who, in the case of quid pro quo harassment, "relies upon his apparent or actual authority to extort sexual consideration," a supervisor creating a hostile environment "does so for his reasons . . . [and] thus acts outside the actual or apparent scope of the authority he possesses as a supervisor."[35] The Supreme Court appeared to accept the *Henson* reasoning — so Justice Marshall responded with the argument that a supervisor's power extends well beyond hiring, firing, and disciplining to encompass all aspects of the day-to-day supervision of the workplace.[36] His observation was apt. Once an employer delegates supervisory responsibilities to an employee, everything that such an employee does carries with it the employer's authority. A supervisor can create a negative, and even hostile, work atmosphere by drawing upon his power over subordinates, power that derives in large part from his position in the workplace hierarchy.[37]

The Court's failure to make clear its rationale for establishing this relaxed standard is disturbing not only because the standard's ambiguity makes it difficult to apply but also because its leniency toward employers may benefit them very little while harming potential plaintiffs a great deal. As Justice Marshall pointed out, were employers to abide by a standard of strict liability — that is, liability without notice — they would still be able to remedy sexual harassment before being taken to court.[38] Because a title VII lawsuit must begin with the lodging of an EEOC complaint, a victim of alleged sexual harassment would put her employer "on notice" merely by filing a claim with the EEOC. Then, by attempting to bring the parties together in statutorily mandated conciliation proceedings, the agency would effect a kind of injunction, allowing an employer the opportunity to intervene and stop the sexual harassment and perhaps also prompting the employer to establish grievance procedures to prevent such sexual harassment from recurring.[39] And if the complaint did reach court,

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[35] *Id.* at 910.

[36] *See* 106 S. Ct. at 2410 (Marshall, J., concurring in the judgment).

[37] *See Horn*, 755 F.2d at 605 ("[A]s long as the tort complained of was caused by the exercise of . . . supervisory power, [the supervisor] should be deemed as acting within the scope of his employment."); Vinson v. Taylor, 753 F.2d 141, 150 (D.C. Cir. 1985) ("The mere existence — or even the appearance — of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose upon employees."); *Henson*, 682 F.2d at 913–14 (Clark, J., concurring in part and dissenting in part) ("[A] supervisor by virtue of his position is enhanced in his ability to create an offensive environment.").

[38] *See* 106 S. Ct. at 2411 (Marshall, J., concurring).

[39] *See id.*; 42 U.S.C. § 2000e-5 to -6 (1982); *see also* Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 985–86 (D.C. Cir. 1973) (holding that the title VII enforcement scheme embodies a clear congressional policy of deferring action in federal court until after a charge has been filed with the EEOC and the agency has attempted conciliation).

the employer would be compelled only to do what it ought to have done at an earlier point: force the harasser to stop.[40]

To the extent that *Meritor* mandates some kind of notice requirement for imputing employer liability in hostile environment cases, it undermines the purpose of the EEOC itself, which as a governmental agency ought to provide a countervailing power to that of the employer. Should victims of sexual harassment be unable to draw upon this power without first informing their employers, many will simply not try to obtain relief: they may be too intimidated to file a grievance within the workplace, wary about the fairness of any procedure administered by the employer or, in the worst case, employed in an environment where no possibilities exist for informing the sexual harasser's superior of the illegal demands.

The Court presented defendants with another defense to sexual harassment charges by holding that evidence about a complainant's "sexually provocative speech or dress" is relevant to a determination of unwelcomeness. It is hard to imagine any circumstances in which evidence about a victim's "'dress and personal fantasies'"[41] could have a bearing upon the question of whether she had been sexually harassed. In *Meritor*, for example, the bank and Taylor presented evidence that Vinson wore sexually provocative clothing, discussed sex often with her coworkers, and experienced a recurring fantasy concerning incest with her deceased grandfather.[42] That the Court considered this presentation as something other than "an assassination of character" designed to create the impression that she was the sort of woman "who *would* have wanted [to be sexually abused]"[43] suggests that the Court views any expression of sexuality by a woman as an invitation for abuse from men. Such a perspective entirely misunderstands what constitutes "receptive" sexual behavior by females: a woman does not signal sexual interest in her supervisor by discussing

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[40] In quid pro quo cases, remedies include injunctions forbidding sexual harassment and the mandating of effective grievance procedures, as well as awards of reinstatement, back pay, attorneys' fees, and court costs. Courts have not, however, awarded damages for such claims as the infliction of emotional distress. *See* Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1464 (1984). Thus, a hostile environment claim, which assumes psychological rather than economic harm, typically results in an injunction and perhaps an award of attorneys' fees. The only case in which a hostile environment claim can burden the employer with significant financial responsibility is one in which a victim who can no longer endure a sexually abusive work atmosphere quits and demands back pay. At least one court has analyzed this situation, called "constructive discharge," within the context of a hostile environment claim. *See* Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. (BNA) 1627, 1631 (W.D. Okla. 1980).

[41] 106 S. Ct. at 2407 (quoting a reference by the court of appeals to testimony about *Vinson*, 753 F.2d at 146 n.36).

[42] *See* Brief of Petitioner at 6, *Meritor* (No. 84-1979).

[43] Brief of Respondent at 41, *Meritor* (No. 84-1979) (emphasis in original).

with her coworkers dreams that she has had about her grandfather. Any implication to the contrary reinforces the atavistic notion that women cannot directly and affirmatively act upon their sexual desires. Furthermore, by shifting the focus of the inquiry from whether the plaintiff found the behavior unwelcome to whether she invited the harassment through subtle suggestions in dress and conduct, this aspect of the decision encourages employers to put the alleged victim "on trial" and may prevent the judiciary itself from controlling a potentially abusive trial atmosphere.[44]

The Court should have ruled all evidence of Vinson's dress and fantasies inadmissible. It should also have established a general holding that all evidence about the sexual life, interests, and behavior of an alleged victim must be presumed irrelevant unless shown to be *essential* for proving mutuality in the relationship.[45] Like the rule that evidence of a victim's past sexual conduct is not admissible in a rape trial,[46] a firm rule in sexual harassment trials against the introduction of evidence concerning a victim's sexual conduct would prevent defendants from playing upon sexist prejudice by invoking the outmoded stereotype of the "bad" or "fallen" woman who asks for abuse.

Meritor does have, as Justice Rehnquist put it, "a rather abstract quality,"[47] in large part because the district court failed to resolve

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[44] The insult and intimidation that women endured during rape trials prompted states to enact "rape shield" laws, designed to control or prohibit the use of evidence relating to the victim's general sexual behavior. *See* Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 32 (1977). Defense counsel, in fact, had felt justified asking victims about their use of birth control, attendance at bars, illegitimate children, and number of prior sexual experiences. *See id.* at 14.

[45] In specific terms, this rule would mean that only evidence about sexual behavior directed toward the defendant would be acceptable. What the plaintiff wore would never be allowed into evidence because even in the rare case that it might be relevant to a determination of receptiveness, the potential of its being used in a prejudicial way far outweighs its usefulness: in a situation in which an alleged victim *used her clothing* to communicate sexual interest, the defendant could introduce more direct evidence to rebut the accusation of harassment. Moreover, a court would be incapable of determining with certainty which among many factors — advertising, employer dress requirements, or the cultural expectations of a woman's family or ethnic or racial group — influenced her clothing selections.

Some women, especially those in male-dominated occupations, may "contribute" to the creation of a sexually charged atmosphere at their workplaces by making sexual jokes or laughing at sexual innuendo in order to gain acceptance by their male coworkers or supervisors. Such women certainly should not lose their rights to claims against sexually abusive conduct, particularly if they can show that they were essentially coerced into participating in a sexual exchange. *But see* Gan v. Kepro-Circuit Systems, 28 Fair Empl. Prac. Cas. (BNA) 639 (E.D. Mo. 1982) (holding that a plaintiff who used crude and vulgar language when associating with male employees during breaks could not claim that she was forced to quit because of this hostile atmosphere).

[46] *See* FED. R. EVID. 412.

[47] 106 S. Ct. at 2408.

such major issues as whether Vinson had been harassed and whether, if she had, the bank had had any notice of the abuse. Although without the factual context it is somewhat difficult to assess the impact of *Meritor*, the first Supreme Court ruling on sexual harassment, its message is emphatic: sexual harassment, both of the quid pro quo and hostile environment types, is a violation of title VII. Unfortunately, the Court did not buttress this condemnation of sexual harassment with holdings that would facilitate either preventing or proving its occurrence. Such backpedaling reflects the Court's conservative perspective on female sexuality. Its opinion may leave without legal recourse those women too intimidated to give their employers any suggestion of resistance[48] and others not "restrained" enough to conduct themselves in a nonsexual manner while at work. This result may seem odd, as the Court appears to be supporting a paradoxical demand that women be both assertive about objecting to sexual harassment and passive about expressing their sexuality. Yet more than just paradoxical, the result is oppressive. Sexual harassment law, as construed in *Meritor*, may fail to prevent sexual abuse in the workplace while undermining the right of working women to be sexual.[49]

The Court's conservative view of female sexuality will strike a responsive chord among those who are troubled not merely by overt manifestations of female sexuality but by any sexuality at all. Represented in their most extreme form by the "New Right," these conservatives believe that all expressions of sexuality in the workplace — both abusive and nonabusive — are problematic because they break down that separation between public and private spheres of activity deemed essential to an ordered, patriarchal society. The Court implicitly buttressed such thinking by suggesting, in its holding on the relevance of provocative dress and behavior, that sex simply does not belong on the job. Yet however conservatively the decision might be interpreted, it does have progressive ramifications. Those seeking to constrain sexual expression and those seeking to constrain sexually abusive expression can agree that sexual harassment is wrong, and *Meritor* will support the efforts of both groups to eliminate it.

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[48] *See* Jeppsen v. Wunnicke, 611 F. Supp. 78, 82 (D. Alaska 1985) (imposing strict liability on an employer in a hostile environment case by reasoning that those employees who do not quit in such an environment may be the ones most in need of their jobs and therefore most reluctant to complain).

[49] *See generally* POWERS OF DESIRE 9–43 (A. Snitow, C. Stansell & S. Thompson eds. 1983) (arguing that a female-controlled sexuality would help women decrease their dependence on men, increase their sexual autonomy, improve their pleasure in sex, and find such pleasure not through subjugation but through an affirmation of identity and power).

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Sexual Harassment in Higher Education: An Assessment Study

Nancy Maihoff and Linda Forrest

A stratified random sample of women students at a large midwestern university were surveyed about whether they had experienced incidents of sexual harassment. Women subjects were asked about four forms of harassment: jokes about women's anatomy; physical touching or fondling of a woman's breasts, buttocks or pubic area; propositions of sex in exchange for rewards; and sexual assault. They were asked about these forms of harassment in three environments: classroom, assistantships, and other work environments. If respondents had experienced one of these forms, they were asked to indicate the degree of their disapproval. Of the 478 respondents, 25.1% reported they had experienced at least one incident of sexual harassment. Explanations for these results are provided and implications are discussed.

Sexual harassment in higher education first drew national attention in 1977 when five women sued Yale University for not having an adequate policy for handling charges of sexual harassment. Shortly thereafter, reports from several other universities indicated that incidents such as those at Yale were not isolated cases (Conference on the Participation of Women in Scientific Research, 1978; Project on the Status and Education of Women, 1978; Till, 1980).

The issues of sexual harassment in the workplace have been well documented (University of Michigan/Wayne State University, 1979). For example, a survey by the Working Women United Institute (1975) reported that 70% of their New York State sample had experienced sexual harassment. In a national survey of 9,000 clerical and professional women, 90% indicated that they had experienced some form of harassment (Safran, 1976). A survey of the alumnae of a small women's college (Sweet Briar College) indicated that the incidents of sexual harassment varied from 0% to 100% of the responding subjects, depending upon the occupational setting (Hopkins & Johnson, 1982). In addition, a study of federal employees (U.S. Merit Systems Protection Board, 1981) found 42% of the female subjects reported at least one incident of sexual harassment.

Several definitions of sexual harassment exist (Deane & Tillar, 1981). The U.S. Merit Systems Protection Board (1981) identified six categories of sexual harassment based on the responses of 23,000 male and female federal employees: uninvited pressure for sexual favors; uninvited, deliberate touching; uninvited suggestive looks; uninvited letters and calls; uninvited pressures for dates; uninvited sexual teasing, jokes, remarks or questions.

The literature concerning sexual harassment on college and university campuses has dealt primarily with one or more of five topics: definitions and descriptions of

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sexual harassment; the effects of harassment on the learning environment and educational opportunities of female students experiencing harassment; the coping behavior of women who have been harassed; legal issues surrounding sexual harassment; and institutional policies concerning sexual harassment (Benson, 1979; Gibbs & Balthrope, 1982; Munich, 1978; Project on the Status and Education of Women, 1978, 1980, 1981; Till, 1980).

Despite this interest in sexual harassment and its negative social consequences, only two university surveys have been conducted (Benson, 1979; Wilson & Kraus, 1981). Benson (1979) found that 20% of a sample (n = 269) of senior women students enrolled at the University of California, Berkeley, had received attention during their studies in the form of "unwanted sexual leers, suggestions, comments or physical contact" from male instructors. These women reported that they were bewildered or confused about how to deal with such situations. In a survey of women at a smaller, southern university (East Carolina University), Wilson and Kraus (1981) found that 33% of the women surveyed (n = 334) reported at least one incident of sexual harassment. In both of these studies, the concept of disapproval or unwanted behavior was implicit in the wording of the questions. Neither study requested information about the subject's degree of disapproval. (Editor's note: See also the article by Metha and Nigg in this issue.)

The purposes of the study reported in this article were to assess the extent to which women students experience sexual harassment at Michigan State University (MSU), and to determine the degree of disapproval of such experiences. The assessment of sexual harassment was part of a larger study on sexist incidents experienced by women at MSU. Only the results pertinent to sexual harassment incidents are presented in this paper.

Methodology

Subjects

A questionnaire and explanatory cover letter were mailed to a stratified random sample of 998 women enrolled at MSU spring quarter, 1979. All women were U.S. citizens and either junior, senior, or non-professional school graduate students. The 478 respondents (48.1%) closely reflected the population of upper-division and graduate women at MSU on the basis of age, major area of study, and academic class.

A small validation study was conducted to determine if women who had been sexually harassed might have been over-represented in the 478 respondents. Forty randomly sampled women from the original 998 were contacted by telephone. Five (12.5%) could not be reached; 18 (45.0%) said they had completed and returned the questionnaire; and 14 (42.5%) said they had received but had not completed the questionnaire. Three of the latter 14 (7.5% of the 40 sampled) said they had not returned it because they had not experienced any harassment or other incidents of sexism at MSU. In the full sexism study, 173 of the 478 respondents (36.0%) reported they had *not* experienced sexist incidents. Thus, a substantially larger number reported no incidents than those contacted in the validation study. Results from the phone survey suggest that incidents of harassment are not overrepresented in the responses to the written questionnaire on harassment and, in fact, may underrepresent the occurrences of harassment.

Questionnaire

The sexual harassment questions were embedded in a larger questionnaire developed to assess the occurrence of sexist incidents at MSU by the Women's Advisory Committee to the Vice President of Student Affairs and Services (Maihoff, 1981). Neither type of question was identified as referring to a form of sexism or sexual harassment. Instead, women were simply asked if they had experienced an incident. No explicit criteria were given to help respondents determine if they had experienced an incident. Thus, respondents provided their own criteria and used their own judgment for determining a response. If respondents had experienced any incidents, except sexual assault, they

were further instructed to indicate their disapproval of the incident on a Likert scale from 1 (not at all) to 5 (very greatly).

Questions were asked about four types of sexual harassment: jokes about women's anatomy; physical touching or fondling of a woman's breasts, buttocks, or pubic area; propositions of sex in exchange for a grade, an assistantship, a recommendation for a job or graduate school, or higher pay; and sexual assault. The questions were asked in relation to one or more of three environments: the classroom, their teaching or research assistantships, and their work environments (full-time or part-time jobs, not including assistantships).

In responding to questions about incidents, the women were instructed to consider incidents that occurred only in the "recent" past. Thus, if harassment occurred in the class environment, students were to consider incidents that took place in their most recently attended class, spring term, 1979. Incidents that occurred in assistantships were to be reported if they took placed during the last 12 months. Incidents that occurred in the work environment were reported for the present or most recent job at MSU. There were no time parameters concerning the questions on sexual assault.

Setting time parameters in this study was an attempt at compromise between detecting an incident if it was occurring in the environment and gaining precision for generalization of the findings. Each time parameter, however, is or may be a different time length; thus, comparison of number of incidents across environments must be made with caution. Also, because of the broad spectrum of the full sexism study, not all types of sexual harassment questions were asked in each environment.

Results

A total of 147 sexual harassment incidents were reported by 120 (25.1%) of the 478 respondents. More specifically, 73 (15.3%) women reported one incident of sexual harassment, 32 (6.7%) reported two incidents, and 15 (3.1%) reported three or more incidents of sexual harassment.

The most frequently reported form was jokes about women's anatomy (n = 110). Of all incidents perpetrated by male assistants (n = 9), seven were these jokes. Of all incidents perpetrated by work supervisors (n = 37), 33 were these jokes. Of all incidents perpetrated by male co-workers (n = 87), 70 were these jokes. The question was not asked about male instructors and supervising faculty.

Of those respondents with a female supervisor (n = 92), two reported that their supervisor had made jokes about women's anatomy. In contrast, among respondents supervised by males (n = 91), 31 reported their supervisor had made such jokes. Thus, respondents experienced significantly more jokes about female anatomy from male supervisors than female supervisors [χ^2 (1) = 31.48, $p < .005$]. Of the respondents with a female supervisor, 26 reported that their male coworkers made jokes about female anatomy. On the other hand, among respondents supervised by males, 44 reported that their male coworkers made such jokes. Thus, respondents with male supervisors experienced significantly more jokes about female anatomy from male coworkers than respondents with female supervisors [χ^2 (1) = 7.52, $p < .01$].

Sixteen incidents of touching or fondling were reported, 14 of which were perpetrated by male coworkers in the work environment. Only two propositions were reported, one by an instructor (for a grade) and one by a work supervisor (for a promotion or higher pay). Fifteen women reported having been sexually assaulted by a male MSU instructor, supervisor, or male peer; four of them reported two assaults.

Respondents' disapproval ratings of harassment incidents varied according to the type of harassment, the perpetrators, and the environment. Of the 126 disapproval ratings, the majority of the women disapproved "some" (n = 30), "greatly" (n = 31), or "very greatly" (n = 36) of the harassment.

However, some types of harassment did not always receive strong disapproval ratings, such as jokes about female anatomy by work supervisors (n = 11) or by male co-workers (n = 13), and touching by male co-workers (n = 5).

Discussion

Sexual harassment at MSU is not an infrequent problem, given that 25.1% of the respondents reported having experienced at least one incident. These results are in the same range as those found at University of California, Berkeley—20% (Benson, 1979) and East Carolina University—33% (Wilson & Kraus, 1981). In contrast with these data, frequencies reported in nonuniversity environments have been three or four times higher: 70% reported by Working Women United Institute (1975), and 90% reported by Safran (1976). There are at least three nonexclusive explanations for these differences.

First, operational definitions of sexual harassment used by investigators varied greatly. Thus, a given social interaction may have been reported as sexual harassment by subjects in one study, but not another, because instructions as to what constituted harassment were dissimilar. Adoption by investigators of a standard definition of sexual harassment (e.g., Till, 1980) would obviously facilitate comparisons among studies. In addition, subjects in various studies were instructed to think about different time periods when recalling incidents of harassment (e.g., 12 months—this study; 24 months—U.S. Merit System Protection Board, 1981; unlimited time—Wilson & Kraus, 1981 and Benson, 1979).

Second, differences among the populations and environments sampled may account for the disparate results. For instance, women may experience sexual harassment more frequently in some environments (e.g., nonuniversity workplaces) than the *same* women would experience in other environments (e.g., college or university campuses). Thus, the number of Sweet Briar College alumnae reporting incidents of sexual harassment ranged from 0% to 100%, depending on the broad occupational categories in which they were employed (e.g., government, retail, medical/health). Environmental factors that may increase the occurrence of sexual harassment include women working in jobs traditionally held by men, high male-to-female ratio in women's immediate work environment, and women working in nonsupervisory or trainee positions (U.S. Merit System Protection Board, 1981). On the other hand, different work environments may attract different educational backgrounds or different socioeconomic classes, a factor which could affect reported incidents of harassment (Hopkins & Johnson, 1982).

Third, different frequencies may have been reported because of differences in sampling methods. The MSU study used a random stratified sample; Wilson and Kraus (1981) used a random clustered sample; Safran (1976) relied on subjects who self-selected themselves in response to a magazine survey. Studies of sexual harassment, in general, have reported higher frequencies when nonrandom self-selection sampling rather than random samples has been used (cf. Safran, 1976 and Wilson & Kraus, 1981).

Even given these differences in definitions and time parameters, populations and environments sampled, and sampling techniques, there is a greater similarity in results among the university studies than among the studies as a whole, suggesting a relatively consistent finding across three university populations.

This study suggests five additional points relevant to sexual harassment. First, women in the sample do not share identical views on what constitutes an incident of sexual harassment. When jokes about female anatomy occurred in the work environment, they did not elicit strong disapproval. This raises the question of whether or not some women consider these jokes as harassment. It would be interesting to know if, for example, a woman considered a particular joke to be harassment when she was being told the joke (and perhaps was its implied subject) but not in a situation in which she heard the same joke being told to others.

Perhaps, what appears to be a more straightforward term—sexual assault—reveals the problem of clearly defining sexual harassment. The current legal definition of sexual assault in the State of Michigan includes four degrees, depending on whether or not bodily touching occurs, penetration occurs, and a weapon is present. Given that sexual assault is variously defined, sexual harassment obviously connotes different behaviors for different people.

On the other hand, the majority of women may be expected to classify touching, propositions, and assaults as clear incidents of harassment. Although propositions and assaults were numerically rare (37 combined instances or 25.2% of the total), these offenses are serious. The actual number of victims and their friends does not have to be large to warrant serious attention by the university.

Second, whereas one might expect women to disapprove unequivocally of sexual harassment, the data suggest that this expectation requires qualification. Women in the work environment may not consider jokes about female anatomy as sexual harassment. Perhaps some women enjoy the repartee and exchange of jokes with no thought about a possible association between the individual making the joke and the misuse of power or authority to influence the women's choices in her work environment.

In fact, when jokes are made by coworkers, women disapprove less than when jokes are made by supervisors. This suggests that the degree of disapproval may be positively related to the degree of authority the perpetrator has over the individual. Or, the environment may suggest to women that these jokes are the norm and are acceptable within the standards of the workplace. To disapprove openly might be to jeopardize the job and advancement. Further, women who do not disapprove may be refusing to allow the jokes to affect their self-esteem or their ability to succeed in their work environment.

The third point concerns the sex-of-supervisor effect on sexual harassment. The results show that women are less likely to experience jokes about women's anatomy if they are supervised by a female rather than a male. Considering that respondents were to report sexual harassment by both supervisors and coworkers, the results suggest that not only are female supervisors less likely to joke, but also that they may influence male workers to refrain from making jokes about women's bodies. In addition, female supervisors may help heighten women's awareness and criticism of such jokes, thus making it less likely that male coworkers will make jokes about female anatomy.

Fourth, across-environment comparisons (classroom vs. assistantship vs. work) must be made with caution. Although there are clear differences in the frequency of reported harassment incidents in these environments, there is no quantitative information about how often potential situations arise in which harassment might occur. For example, women custodians working at night probably contact male coworkers and supervisors less often than female graduate students working daily on a research project with their male graduate advisors and other graduate students.

The total number of reported incidents of sexual harassment at MSU were limited by three factors. First, incidents from the classroom environment were to be reported only from the most recently attended class, excluding those occurrences in other spring term classes or occurrences during the previous two terms. Second, the questions on jokes about female anatomy, the most frequently reported form of harassment, were not asked in two environments (the instructor in the classroom and the supervisor in the assistantship), which may have eliminated numerous incidents of harassment. Third, subjects were to have reported only one incident within each category, thus precluding the report of multiple incidents within one category.

Finally, in discussions of these results with colleagues and in review of university policy and services available to students experiencing sexual harassment, a further area of concern has been uncovered. A small number of women in the sample reported having had intimate relationships, including sexual intercourse, with an instructor or faculty advisor. These relationships began freely and were mutually agreed upon by both parties, but when such relationships ended by the woman's choice and not the man's, there was the potential for sexual harassment. Although our questionnaire did not explicitly ask about such incidents, a random sample of 481 psychology educators of Division 29 (psychotherapy) of the American Psychological Association revealed that 25% of women graduates within the last seven years reported sexual contact as students with psychology educators (Pope et al., 1979). Strikingly, women students

were five times as likely to have such relationships with their male educators as were men with their female educators. Given the nature of their programs and training, psychologists are obviously not representative of all university personnel. Nevertheless, it is extremely unlikely that intimate male-female relationships are confined to a few sectors in the university. Thus, it becomes important to know if women's educational and career opportunities are being influenced by these relationships. If so, are these effects attributable to the misuse of institutional power and do they, therefore, constitute a form of sexual harassment?

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Sexual Harassment on Campus: An Institutional Response

Arlene Metha and Joanne Nigg

In recent months, there has been much discussion about the issue of sexual harassment particularly in the workplace. Several institutions of higher education have also responded to this pervasive sex discrimination problem by formulating appropriate policy statements, guidelines and grievance procedures. A few institutions have also designed research studies to determine the extent of the problem on their respective campus. This article explores one institution's response to the matter of sexual harassment and what steps it intends to take to alleviate the problem.

On January 29, 1980, a Joint Student/Faculty/Staff Study Committee was established to examine the issues of sexual harassment on the Arizona State University Campus. The objectives of the joint committee were as follows: (1) attempt to define what constitutes sexual harassment; (2) determine to what extent this problem exists on campus; (3) review existing affirmative action/grievance procedures and counseling services to determine if such established processes can adequately address and resolve complaints; and (4) ascertain if there is a need for further awareness or further mechanisms to deal with any problems of sexual harassment.

Method

The Questionnaire

A 50-item questionnaire was designed to elicit information on sexual harassment in three areas—perceptions, experiences, and knowledge about resources at the university. Throughout the questionnaire, respondents were repeatedly reminded that they should restrict their answers to beliefs about the experiences at the university. Because of the committee's goals, we were not interested in sexual harassment in the larger society.

After a survey of over 100 universities and colleges throughout the United States and review of other research on sexual harassment, it was decided that a specific definition of the term needed to be provided to the respondents to assist them in distinguishing between sexual harassment and other forms of discriminatory or inappropriate behavior. The definition of sexual harassment used in the study was:

> Sexual harassment may occur when a person is in a position of authority, or is able to control or affect another person's academic career, grade, job, or emotional well-being. Sexual harassment takes place when an individual subjects another person to unwanted sexual attention (either verbal or physical), coerces him/her into sexual relations, and/or punishes her/him for refusal.

In order to provide some consistency, a restatement of the definition, broken down into its component parts with some examples to clarify the meaning of the formal definition, was also included. It was felt

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that this clarification would give respondents a common frame of reference.

The Sample

Unlike others that have been conducted on university campuses, this study included students, staff employees, and faculty members. The population for our study included all part-time and full-time faculty, staff, and students at the university in the fall 1980 semester. A stratified, representative sample of 250 women was selected from each of these groups.[1] Faculty were stratified on the basis of academic rank, staff by EEO job classification, and students by class standing.

The purpose of this particular design was to yield groups that were sufficiently large for comparison purposes. The sample was drawn and control procedures introduced to insure the confidentiality of respondents.

Self-administered questionnaires were mailed to faculty and staff campus offices and to students' home addresses. The response rate, after three follow-up mailings and phone calls, was over 80% in each group.

Survey Findings[2]

Magnitude of the Problem

The incidence of sexual harassment on campus reported by each group of women was: students 13.3%; staff 11.2%; faculty 13.7%. Compared to the results of other research on harassment, particularly with university populations, these figures may appear to be low. Do the figures imply there is no problem on our campus? Or is ours a particularly unique community where such behavior is not acceptable?

With respect to the first question, low percentages do not mean few cases. Thirteen percent of the student body includes more than 2,300 women. In terms of numbers of people, that rate of incidence is hardly indicative of a minor problem. In answer to the second question, two possible explanations for the relatively lower than usually reported figures arise from the methodology. Unlike other studies, we provided a specific definition, one which excluded more common forms of sexist behavior that may be characterized as sexual harassment in other studies. Also, the rigorous sampling design and follow-up procedures that yielded a high response rate may have substantially affected the nature of our findings. Many previously conducted studies used nonprobability samples of respondents or settled for low response rates. Both of these practices result in findings which are not generalizable to university populations.

Since a large proportion of the reported experiences took place while the respondents were in some different positions on campus (e.g., a current staff member was harassed when she was still a student), it is necessary to look at the harassee's[3] status at the time of the incident to get a true picture of harassment situations. Of the 74 women who responded as being harassed, their statuses at time of report were: undergraduate students, 45.9%; graduate students, 17.6%; staff, 17.6%; faculty, 18.9%.

Severity of the Problem

The severity of the problem was expressed on a continuum of harassment ranging from sexism to assault. The specific levels of harassment included the following categories:

Sexism refers to either sexist remarks or sexist behaviors.

Sanction-free advances refers to offensive advances (sexual propositions) or inappropriate behaviors (touching, patting, caressing, kissing) that are made without threat of punishment or promise of reward for compliance.

Advances with consequences refers to the above types of advances and behaviors that are accompanied by promised rewards or threat of punishment for compliance.

Assault would include physical violence or unwanted sexual intimacy following an offensive proposition.

While the actual reported numbers were small and must be interpreted with care, two general conclusions were drawn from the findings. First, male faculty members do perpetuate the greatest amount of sexual harassment on campus. With the

exception of staff men's sexist behaviors toward staff women, male faculty initiate the majority of harassment. Second, instances of the most severe forms of sexual harassment—advances that are accompanied by consequences for compliance or noncompliance and assault—are extremely rare. The classic situation, in which a male faculty member sexually pressures a female student, occurred in only 8% (6 of 74) of the reported experiences. The most severe form of sexual harassment, physical violence or sexual intimacy following an offensive proposition, occurred contrary to our hierarchical definition of the misuses of authority: two faculty women reported being assaulted by undergraduate male students.

The Complaint Process

Since the purpose of the joint committee was to make policy recommendations, it was important to determine what resources women felt were available to them if they were faced with a sexual harassment situation. First, the resources used by those who had actually been harassed were evaluated. Only 20% (15 of 74) of the harassees actually tried to lodge a complaint about the incident; less than half of these complainants (7 of 15) were satisfied with the manner in which their complaints had been handled. Faculty women who used their deans or department chairs, and undergraduate students who used off-campus resources (e.g., city police, lawyers) were more satisfied than others.

Second, an evaluation of the places women would go to lodge a complaint if they had been harassed was conducted. An open-ended question was asked about the "best" place a woman might make a complaint. The most striking finding was the high number of women who either did not answer or did not know where they would go (students, 21.5%; staff, 15.4%; faculty, 18.4%). For all groups, the lack of knowledge constituted the model response.

Later in the questionnaire, women were given a 26-item list of offices, departments, and organizations they personally might choose to lodge a sexual harassment complaint. Two resources were identified as most important in the complaint process by all women and previously harassed women in each group—the university's affirmative action office and the offices of various deans. The findings concerning these resources were taken into consideration in the planning and development of a university-wide policy concerning sexual harassment.

Policy Statement, Guidelines, Procedures and Recommendations

Following the survey results, the Joint Committee to Study Sexual Harassment formulated policy, guidelines, and procedures to handle complaints and grievances alleging sexual harassment. The committee also proposed a set of general recommendations to the university administration. The following were adopted:

Policy

Arizona State University prohibits sexual harassment by all faculty, staff, and students. The University is committed to creating and maintaining a working environment for all University personnel and students which is free of objectionable and disrespectful conduct and communication of a sexual nature that interferes with an individual's work performance or creates an intimidating, hostile, or offensive working or learning environment.

Definition

Harassment on the basis of sex is a violation of Section 703 of Title VII of the Civil Rights Act of 1964, as amended, and Title IX of Education Amendments of 1972.

The following definition will aid in identifying the kinds of behavior which constitute sexual harassment:

> "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when: 1) submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of instruction, employment, or participation in other University activity; 2) submission to or rejection of such conduct by an individual is used as a basis for evaluation in making academic or personnel decisions affecting an individual; or 3) such conduct has the purpose or effect of unreasonably interfering with an individual's performance or creating an intimidating, hostile, or offensive University environment."

In determining whether the alleged conduct constitutes sexual harassment, consideration should be given to the record as a whole and to the totality of the circumstances, including the nature of the sexual advances and the context in which the alleged incidents occurred. Retaliation against an employee for filing a sexual harassment complaint is grounds for a subsequent harassment complaint.

Guidelines

(A) It shall be a violation of University policy for anyone who is authorized to recommend or take action affecting faculty, staff, or students: 1) to make sexual advances or request sexual favors when submission to or rejection of such conduct is the basis for either implicitly or explicitly imposing or granting terms and conditions of employment that either favorably or adversely affect the faculty, staff, or student's welfare; 2) to grant, recommend, or refuse to take action because of sexual favors, or as a reprisal against the person who has rejected or reported sexual advances; 3) to act on the basis of sex with the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment; 4) to disregard and to fail to investigate allegations of sexual harassment whether reported by the person who is the subject of the alleged harassment, or a witness, and to fail to take timely corrective action in the event misconduct has occurred. Whenever there is an abuse of authority or neglect of responsibility involving sexual harassment, the supervisor is required to take prompt and corrective action consistent with discipline provisions of the appropriate policy manual.

(B) A faculty, staff, or student member alleging either a) *sexual harassment by anyone with supervisory authority* or b) *failure by the supervisor to take timely action on the individual's complaint of being sexually harassed by someone not in a supervisory capacity,* (such as a co-employee, a student, or a campus visitor), may file a written complaint with the Office of Assistant to the President for Equal Employment Opportunity and Affirmative Action by following the procedures developed by that office. Filing a complaint or otherwise reporting sexual harassment shall not cause any reflection on the individual's status as a faculty, staff, or student member, nor shall it affect future employment, compensation, work assignment, or student status.

(C) The right to confidentiality of all parties involved in a sexual harassment charge shall be strictly adhered to insofar as it does not interfere with the University's legal obligation to investigate allegations of misconduct when brought to the University's attention, and to take corrective action.

Responsibilities

Procedures for reporting allegations of sexual harassment and for taking corrective action:

Responsibility of:	Action:
Faculty, staff, or student member:	1. Report sexual harassment to immediate supervisor and if necessary, to the next level of supervision and/or to the Assistant to the President for Equal Employment Opportunity and Affirmative Action.
	2. If after review by the Assistant to the President for Equal Employment Opportunity and Affirmative Action, the complainant is not satisfied with the decision, the complainant may file a written complaint with the Board on Equal Opportunity.
Administrator receiving complaint of sexual harassment:	3. Notify Assistant to the President for Equal Employment Opportunity and Affirmative Action who may advise on procedures and required action. The administrator shall investigate the allegations immediately and if misconduct has occurred, take timely disciplinary action up to and including termination of employment in accordance with University policy. Failure to act by the administrator is also misconduct subject to disciplinary action.
	4. After review of any written complaint filed with the Office of Assistant to the President for Equal Employment Opportunity and Affirmative Action, the complaint may be referred to the Board on Equal Opportunity for fact finding and recommendations.

In addition to suggesting the need for a clear policy statement prohibiting sexual harassment, the Joint Committee to Study Sexual Harassment also proposed the following general recommendations:

- Encourage department and college personnel committees to review the results of the survey and general recommendations and take appropriate actions.
- Publish the policy statement in the Faculty Handbook, Staff Personnel Manual, and Student Handbook, as well as other University publications.
- Alter the Faculty Code of Conduct so that it is consistent with the University policy and definition of sexual harassment.
- Outline the grievance procedures for responding to complaints of sexual harassment.
- Publish the grievance procedures in the Faculty Handbook, Staff Personnel Manual, and Student Handbook, as well as other University publications.
- Include policy language in all affirmative action plans.

- Develop a booklet advising students and employees of their rights and how to handle and, where possible, avoid sexual harassment. Such a pamphlet might be developed by a campus committee composed of faculty, students, and staff, and should include information on what the individual can do, such as:

  Directly confront the harasser and establish a pattern of resistance.

  Keep records and document the incidents.

  Keep track of individuals present who may serve as witnesses.

  Talk with others to determine if they have been harassed.

  Seek organizations that may offer help, such as the University Counseling Center, Campus Ministry, Faculty Women's Association, Office of Women's Studies, Women's Affairs Board, Feminists United, etc.

- Train supervisory and administrative staff (in particular, deans and department chairs) in preventing and correcting inappropriate sexual behavior with well-conceived counseling and discipline.

- Provide training of counselors and other student personnel staff to deal with sexual harassment issues raised by students.

- Encourage the establishment of a 24-hour crisis hotline to provide counseling and referral services to students, faculty, and staff concerned with the problem of sexual harassment. Such a service might be sponsored by the Counseling Center, Office of Women's Studies, Women's Affairs Board, Affirmative Action Office, etc.

- Encourage the Office of Affirmative Action to offer the following services:

  Provide community education to increase awareness of the nature and scope of sexual harassment.

  Provide training and consultation on: identification of sexual harassment, needs of individuals who have been victims of sexual harassment, options and procedures for dealing with sexual harassment.

  Promote and support a network of advocacy, referral, and support services to individuals who have been victims of sexual harassment.

- Seek funding to organize and implement a regional conference concerning the issues of sexual harassment in higher education. Invite PAC 10 and other interested institutions.

- Encourage and fund research to analyze the causes, extent of, and remedies for sexual harassment on campus.

- Encourage an on-going university evaluation to determine the effectiveness of the implementation of policies and procedures.

Status Report

At the time of this writing, the university had inaugurated a new president, appointed a new affirmative action officer, and experienced a major change in its administrative structure. Immediately following the report of the joint committee, a policy statement was approved and circulated among the university community. Following the request of the faculty senate, the new president appointed an affirmative action committee to monitor the implementation of policies and procedures related to affirmative action, including the issue of sexual harassment. The committee was also charged with reporting implementation efforts to the faculty senate at the end of the academic year.

Two resources were identified as most important in the complaint process by all women and previously harassed women in each group—the university's affirmative action office and the offices of various deans.

A special training program for supervisory and administrative staff was also initiated by the Office of Affirmative Action to assist management personnel in preventing and correcting inappropriate sexual harassment behavior. Since the university policy has been in effect, several individuals have come forth with alleged grievances concerning sexual harassment. While one cannot generalize that there are increased numbers of sexual harassment cases, it appears as though the university community is becoming more sensitive to this problem.

It is too early to determine the implications of the study and effects of the policy at this time. One thing is certain. The issue of sexual harassment is no longer a "closet concern" but rather a general concern of students, faculty, and staff that is being discussed in an open and honest manner. What began as a committee concern has become a major university commitment. Our collective efforts are long overdue!

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[1]The study also included equal-sized stratified samples of men in each of these groups. Findings pertaining to males' experiences with sexual harassment, however, will not be dealt with in this paper.

[2]Tabular data are available from the authors.

[3]The term "harassee" is being used in lieu of the more commonly ascribed "victim" label. This decision was made as a result of the consequences that the "harassee" experienced (i.e., sixty-six percent reported no negative consequences in terms of grades, job, career chances, or mental well-being).

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Activism, Research, and Policy: Sexual Harassment

Sue A. Blanshan

After documenting the seriousness and extensiveness of sexual harassment on the university campus, this article reports on a case study of sexual harassment policy development. A problem-solving model is proposed which equally incorporates the role of activists, researchers, and policy-makers.

Colleges and universities are currently recognizing that they face a substantial barrier to the maintenance of an environment which is conducive to academic and scholastic achievement. This barrier is sexual harassment. A variety of activities have been devised to address, define, and confront the problem of sexual harassment. Among these are political activism on the part of those who view sexual harassment as a severe form of sex discrimination. In addition, research is being conducted to define, describe, and measure sexual harassment in academe. Finally, efforts to develop policy and grievance procedures are being undertaken by students and administrators alike. This paper demonstrates the importance of each of these general types of activities in the university's response to sexual harassment through a case study which illustrates the importance of combining all three—activism, research, and policy development.

Defining the Issue

Sexual harassment is the unwanted imposition of sexual requirements in the context of a relationship of unequal power. It results when any unwanted sexual attention is experienced at school or on the job. In the university setting, the sexual harasser may be a dean, department head, colleague, student, professor, teaching assistant, or adviser; but whatever the nature of the relationship, the essential dynamic of sexual harassment is the use of sex as an instrument of power over another.

The power dynamics of sexual harassment may be illustrated through an analysis of the forms in which it appears. There are two basic types of sexual harassment: the bargain and the course of conduct (MacKinnon, 1979). The bargain is suggested by the sexual harasser and generally goes something like this: if you will have sex with me, I will give you an A in this course (or I will back you for promotion). It may, of course, be stated as a threat. In the second type, the course of conduct, the bargain is not proposed either explicitly or implicitly. Instead, there is pervasive touching, sexually suggestive remarks, or other means of creating an inappropriate, sexually charged atmosphere when the woman (perhaps any woman) is present. This course of conduct says to the woman that she functions principally, if not exclusively, as sexual stimulus for the harasser and that he has the power to keep her in that role. Her official role as student or professional colleague is dismissed as unimportant. The course of conduct may be converted into a bargain at any time by the harasser, in order to obtain and enforce the woman's tolerance of the unwanted behavior. Even when there has been a

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consensual intimate relationship, the ending of that relationship may be the beginning of sexual harassment. That is, retaliation may be directed at the woman for her failure to satisfactorily meet the terms of the bargain. Sexual harassment is possible because of women's historically subordinate position in higher education and because of the need some men have to act out their privilege and power in insidious and blatant ways with women and at the expense of women (Richardson, 1981).

When barriers are disproportionately experienced by one category of people solely on the basis of skin color, nationality, religion, and/or gender, this is *discrimination*. When barriers to equal educational and employment opportunity are experienced solely because of one's sex, as is the case with sexual harassment, this is *sex discrimination*.

Women who experience sexual harassment in our institutions of higher education are being denied equal educational and career opportunity. The fundamental injury is the basic disregard for their autonomy and their intellectual development.

Either thwarting or obstructing a person's educational and career goals may have significant economic, social, and psychological consequences. Sexual harassment is one means of blocking women's progress in these areas. When women are made to feel uncomfortable in classes where sexist jokes are continually told, when women feel that they risk a proposition or assault if they socialize with academic associates, when women are thought odd and so labeled for pursuing a male-dominated program, when women must avoid mentoring relationships to avoid pressure for sexual relationships, they are experiencing sexual harassment. The consequences of this type of sex discrimination are often a combination of decreased earning power, social isolation from peers, and lowered self-esteem.

Interference with women's educational accomplishments by faculty and/or peers must be looked at very carefully. Currently, women with four years of college education earn less than men with eighth grade educations (Richardson, 1981). Because women are underrepresented at the higher faculty and administrative ranks, women suffer from a lack of female role models as well as from an absence of informal collegial relationships with other women. The significance of this void is something which men continually minimize but are never required to face themselves. Finally, the psychological trauma experienced by a woman who is told that she was hired to function either as an ornament or a token or, perhaps even more significantly, the trauma suffered by a woman assaulted or raped by an employer or advisor, has begun to be documented in the literature (Backhouse & Cohen, 1978). Women who experience sexual harassment in our institutions of higher education are being denied equal educational and career opportunity. The fundamental injury is the basic disregard for their autonomy and their intellectual development.

The pervasiveness of sexual harassment in the workplace has been well documented in recent years by a number of studies (Safran, 1976, 1981; U.S. Merit Systems Protection Board, 1981; Working Women's United Institute, 1954). Some of these efforts have focused exclusively on the university setting as the place of employment and/or enrollment of the victims of sexual harassment.

These studies indicate that sexual harassment is a very serious problem for students, staff, and faculty women in our universities. Benson and Thomson (1980) found that at the University of California at Berkeley, 30% of the female seniors and 20% of all female students had been sexually harassed by at least one male instructor while attending college. At California State University at Long Beach, Reilly (1978) found that 37% of her student sample had experienced sexual harassment; 82% of these victims were female. A study at East Carolina University found that nearly one in three female

students had been sexually harassed by one or more male teachers (Kraus & Wilson, 1981). While the earlier studies on college campuses focused only on student populations, the later work has generally included faculty and staff populations as well.

A joint committee of students, staff, and faculty at Arizona State University surveyed all three populations in 1980 and found that 9% reported that they had experienced sexual harassment at that university. Of the women in the study, 13% reported being sexual harassed, while 5% of the men reported these experiences. Another finding was that the victim population consisted of 54% students, 17% staff members, and 29% faculty. Among the student victims, 85% were female; among the staff victims, 76% were female; and among the faculty victims, 48% were female.

The joint committee also asked respondents about their perceptions of sexual harassment. Faculty males minimized its frequency and its seriousness more than *any* other category of respondents.

It is therefore strange that they would self-report experiencing such a comparatively high frequency of sexual harassment. A possible explanation of this finding is offered by a descriptive study of sexual harassment conducted by the author at the Ohio State University in 1980. If males reported being sexually harassed, they said that it was no big deal, was flattering, and had occurred in a private setting, such as a residence. However, when females said that they had been sexually harassed, they said that it was frightening, was inflicted by someone of higher status, created fear of or actual retribution, and had occurred in a public educational or professional setting, such as a classroom or office. In other words, in these surveys men are generally *not* reporting sexual harassment, i.e., an imposition by a power superordinate of unwanted sexual demands which threaten one's equal educational or employment opportunity.

The concept of power imbalance that defines sexual harassment as an act of power rather than an act of sex is all too clearly illustrated by the females' responses. Sexual harassment is primarily a women's issue because the targets are predominantly women and the harassers are almost always men. In its first four years, the Alliance Against Sexual Coercion, an advocacy organization in Boston for victims of sexual harassment, has had only eleven male clients, out of 1,500 cases, seven whom reported their harassers to be other men. In a 1980 study conducted by the U.S. Merit Systems Protection Board, 42% of the 20,000 federal employees surveyed reported they had been harassed in the previous two years and that 95% of this sexual harassment had come from men. Sexual harassment results from and reinforces the power imbalance in American society between women and men.

Method

The data for this study were derived by the case study method. Through participant observation of a large public university's response to the issue of sexual harassment and the analysis of documentary material, whenever available, a conceptual model which suggests a constructive and useful approach for mobilizing universities' responses to the issue of sexual harassment was inductively formulated. This model bases its immediate validity on increased awareness and understanding of sexual harassment, protection of victims of sexual harassment, and punishment for the perpetuators of sexual harassment. The model's ultimate validity will be measured in the eventual eradication of sexual harassment on campuses where it is applied. However, it is the development of the model which is being reported here. Its testing will result from applications in a variety of university settings in the future.

Sequence of Events

The basis of the analysis involved a qualitative, descriptive approach to a specific sequence of events which occurred in response to the awareness of and incidence of sexual harassment on campus. This sequence of events occurred over approximately a two-year period from early spring 1980 to late spring 1982. All events analyzed are relevant to the university's response to the problem of sexual harassment on its campus.

On April 11, 1980, Interim Guidelines on Sexual Harassment for Title VII were issued by EEOC. These guidelines would make sexual harassment a form of discrimination and therefore illegal in any organization that receives federal support. The distribution, publicity about, and inevitable enactment of these guidelines evoked interest and attention among high-level administrators at the university, who would be obliged to uphold and enforce the EEOC intent. Independent of this interest, a survey focusing on the nature and extent of sexual harassment of students and faculty at the university was being conducted by the student affairs office for women. Its results documented the existence of sexual harassment for both women students and faculty, and the punitive nature of its impact on these victims. In response to these findings, a student coalition began work on a handbook which would help educate the campus about sexual harassment and the sources of assistance for persons who experienced sexual harassment. Therefore, during the spring of 1980, there were two independent group efforts to deal with the problem of sexual harassment at the university.

By early summer a committee consisting principally of college deans and the director of the affirmative action office was appointed to develop a university personnel sexual harassment policy. Neither campus staff nor faculty, who had conducted research on sexual harassment, nor students, who were developing the sexual harassment handbook, were appointed to this committee.

In July 1980, a draft policy was circulated only to the vice presidents of the university for their discussion and approval. About this time, several things happened to alert the campus women's community to the existence and the content of the draft. A member of the student coalition who interviewed the affirmative action director was told that the university currently had a policy on sexual harassment that was about to be put into effect, and that the director of the student affairs office for women knew about and approved of the policy. The student reported this information to this director, who had not been involved in developing the policy. In the same week, one of the vice presidents asked this director to review and critique the policy.

In early August 1980, the director submitted a thorough critique of the policy, which pointed out some of its major problems. Among these were its undue emphasis on "false accusations" of sexual harassment, which might discourage, perhaps even threaten, any person wishing to file a complaint. The wording of the policy unfortunately suggested that the university's commitment to action against sexual harassment might not be sincere, because it stated only that the university *did not condone* sexual harassment, not that it *would not tolerate* such behavior. The policy also excluded any coverage of student harassers, unless they were university employees and engaged in such behavior while functioning in that role.

At this point, then, a policy statement drafted by high-level administrators without participation of those who had been working on research and a handbook was being hurried through the approval process. Several attempts were made to revise the policy through appropriate organizational channels by women administrators and student coalition members. Despite repeated attempts to suggest revisions, none were made; the final policy statement was distributed early in September 1980.

By the end of September, with the beginning of the school year, political activism against the sexual harassment policy was beginning to take shape. The efforts were generally coordinated by administrators and faculty members who, having failed to obtain revisions in the policy through channels, now turned to collective means. The organizational base of activism came from administrators, faculty, and students associated with the academic women's studies program and the student affairs office for women. Several tactics were used to stimulate a broadbased awareness and discussion of the policy. First, an open letter to the university's "Friends of Women" was distributed. Then an open meeting to discuss the policy was held. Out of this meeting, there emerged

the Ad Hoc Committee to Formulate an Effective Sexual Harassment Policy, composed of faculty and administrators whose work focused on women's issues. There was a timely visit to the campus by Catherine MacKinnon, author of *Sexual Harassment of Working Women*, during which she publicly critiqued the policy. Her visit was sponsored by a campus coalition of women's groups and organizations. The campus newspaper was contacted and utilized as another medium for publicizing difficulties with the policy and the process by which it had been developed and implemented. A letter was written by the ad hoc committee to the president of the university, signed by fifty faculty members, stating the need for changes in the policy. A campus feminist publication with wide circulation ran an editorial criticizing the policy. Finally, after considerable research on legal issues pertinent to the policy and on policies of other universities, the ad hoc committee that had formed out of the open meeting submitted its report and recommendations to the president and the provost.

In early November 1980, the provost sent the Sexual Harassment Policy to three university senate committees, the governing body of the university, for review. Hearing this, the ad hoc committee then forwarded its report to these same committees. Three months later, two of the committees responded by recommending the changes that had been recommended by the ad hoc committee. However, no formal action was taken on these recommendations. In January 1982, one year later, a revised edition of the university's operating procedures was published in which there were no changes in the sexual harassment policy.

This unyielding policy was once again under attack by those seeking its revision. In March 1982, a letter was sent to the provost by an influential faculty member. This letter expressed concern over the fact that the sexual harassment policy had been reissued with no changes. It further stated that the recommendations of two duly constituted university committees were being ignored. This letter was taken as a personal affront and therefore retracted. Nevertheless, one month later the provost appointed an official ad hoc committee to review the policy based on the recommendations of the two committees. By June 1982, a substantially revised policy was received by the director of the student services office for women to review. There was still one reference to false accusations, and it was strongly recommended that it be deleted. In general, however, the policy revision was a supportive statement for women and a clear condemnation of sexual harassment. This revised statement is now the university's official policy on sexual harassment.

A Model For Problem-Solving

One thing that is notable about this sequence of events is the interaction of three basic types of activity on the university campus: research, policy development, and political activism. As the whole university community, rather than one segment of its population, sought to respond to and resolve the issue of sexual harassment on its campus, all three orientations proved to be important. The exclusive use of any one of the three would have had the potential to minimize the response to an important campus problem. In fact, the failure to achieve a balanced use of all three did for a time create difficulties and limited the adequacy of the response. If impeded from

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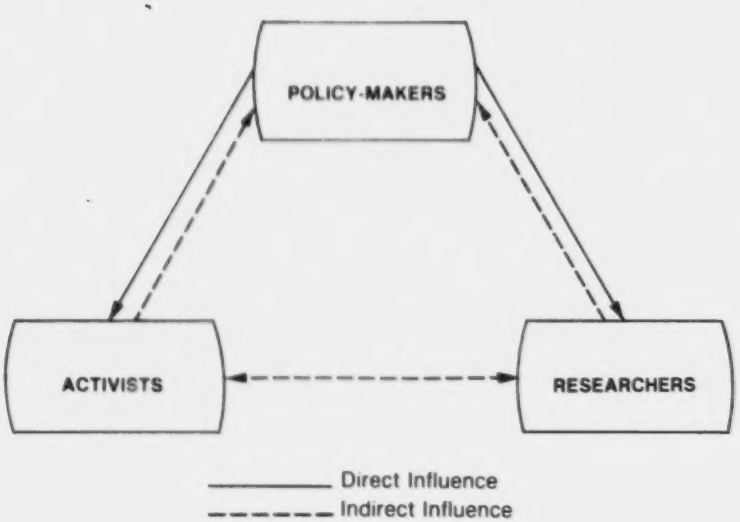
distributing and applying research findings, the researchers would have been able to analyze sexual harassment, but unable to help solve the problem on campus. In isolation, the policy-makers were able to draft a policy but did not know if it addressed the key issues of sexual harassment or if it would be effective when applied. Without some integration into the principal functions of the university, the activists would have been left simply to highlight the significance of sexual harassment without a legitimate means of sanctioning harassers. The interaction of all three strategies works to maximize the awareness and understanding of sexual harassment, the protection of its victims, and the ability to sanction those who harass.

This case study suggests a problem-solving model which, when applied, would facilitate the development of an open process that incorporates a variety of constituencies and sectors of the university. As depicted in the diagram, this model provides a linkage between three types of roles: the activists, the policy-makers, and the researchers. Perhaps it should be stated that "the activists" are also official, legitimate members of the university community, not outsiders, as some may choose to see them. None of these role categories is mutually exclusive; a person could potentially occupy two or more simultaneously. Nor, however, are any of these role categories mutually inclusive; while some activists are also researchers, not all are. The diagram also illustrates the linkages between the role categories. There is either a direct influence, as specified by organizational rules and regulations, or indirect influence, which exists as the result of informal relationships in the university setting. Clearly the policy-makers have control over direct influence, and in this situation have opted to act, for the most part, as if there were no such phenomenon as indirect influence. However, there are other equally valid voices to be heard from in the university. It is from the combination of these influences that action occurs, and from this combination that an adequate response to the problem of sexual harassment evolved.

Problem-Solving Model for Universities



Conclusions

The university's tradition of scholarly research is certainly widely accepted and recognized as legitimate. A distinction may be drawn between what has been called basic research and policy-oriented research, the former viewed as having an intellectual, theoretical basis and the other as having a political, practical basis. Both types of research have focused on the issue of sexual harassment, and both have provided information which may be used to address the issue. In fact, university research has been essential for this society's recognition and understanding of sexual harassment. It is important for these efforts to continue, and for university personnel who are addressing the problem of sexual harassment to familiarize themselves with this research literature.

The American university and the American society has a tradition of political activism, a tradition which has grown out of the university's emphasis on and respect for critical thinking. Campus political activism of the past 20 years has helped both the university and society address a wide array of equity issues. On this particular campus, there is a strong activist base which has addressed a variety of women's and minority issues in the last several years. The reappearance of activism to aid with solving the problem of sexual harassment is consistent with this civil rights tradition.

The model presented in this article describes the process by which it is possible to create an effective university response to a social issue. It is a process which minimizes conflict and delay, while it is open and collective. The experience of this university and the proposed model suggest a process for mobilizing collective efforts and for maximizing the diversity of voices in the policy-making process.

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Implementing a Sexual Harassment Program at a Large University

Lou Anna K. Simon and Linda Forrest

This article describes the essential elements of a comprehensive program to combat sexual harassment at a large university. It consists of three parts: an outline of the conditions necessary to develop a comprehensive program, a description of the major components and their implementation within a university's affirmative action program, and a discussion of issues which have emerged during the implementation of this program.

This paper describes key points to consider in the design and implementation of a comprehensive program on sexual harassment at a large university: (1) conditions for an organizational framework; (2) major components of the sexual harassment program and their implementation within the context of a university's affirmative action program; (3) issues that have emerged during program design and implementation.

Organizational Conditions

A policy statement by the institution's governing board is a necessary condition for the development of an effective sexual harassment program. This statement must clearly indicate that sexual harassment is a form of discrimination that will not be tolerated. In 1972, the Board of Trustees of Michigan State University (MSU) adopted an antidiscrimination policy which included a statement about harassment. This early action set the foundation for further development of MSU's program on sexual harassment.

The second condition is identification of the persons responsible for implementing the university policy on equal opportunity, nondiscrimination, and affirmative action, including the policy against sexual harassment. Line administrators, particularly deans, directors, and chairpersons, are responsible for academic excellence and the efficient and effective management of units. Within this context, administrators are responsible for the quality of the work and learning environment. A commitment to a quality environment requires efforts to eradicate barriers to productivity and to learning. No academic administrator should question this responsibility for quality.

Since sexual harassment affects the productivity of employees and the ability of students to use the resources of the institution, it is one of the barriers administrators must eliminate. Line administrators must, therefore, know about the university's policy, understand their responsibility to implement it, and be held accountable for its implementation.

Because no single individual can monitor effectively all actions which affect the quality of the work and learning environment in a large, complex university, line administrators must implement organizational change strategies necessary for the elimination of sexual harassment. Thus, the second major condition for an effective program on sexual harassment is that performance assessments by and of line

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administrators must include evaluation of the implementation of university policies on equal opportunity, nondiscrimination, and affirmative action. This strengthens the university's ability to deal with cases of sexual harassment at every administrative level.

Third, too often affirmative action programs focus only on hiring or other activities that can be represented numerically. Such quantitative emphasis is necessary given federal laws and regulations; unfortunately, it tends to divert attention from the programmatic efforts created to assure students and staff full participation in the university community and the achievement of personal and professional goals. However, when the scope of affirmative action programs includes the quality of the environment, administrators have a tool to use in working with faculty and staff to examine behaviors, including those in the classroom, which affect individual learning and work performance. Consequently, the tendency to focus only on physical contact as sexual harassment is deemphasized.

The experience at MSU suggests that all three elements—a strong board policy, a model which holds line administrators accountable for implementing the policy on affirmative action that includes sexual harassment, and an affirmative action program which focuses on quality of environment—are necessary conditions for developing and implementing a sexual harassment program with far-reaching impact on the organization.

Program Components

The organizational conditions described above underlie the development and implementation of the following five-point, university-wide program.

Policy Dissemination

The first component is dissemination of the policy in a memorandum from the president which emphasizes that sexual harassment is a barrier to individual achievement and overall institutional productivity, and stresses the responsibility of administrators and supervisors to create and maintain an environment that is free of discrimination and allows full access and opportunity for participation to all members of the university community. Such a communication, which is recommended by numerous sources (Deane & Tillar, 1981; Sandler et al., 1981; Till, 1980; U.S. Merit Systems Protection Board, 1981), is critical to a comprehensive, effective program because it sets an institutional attitude, permits people to hold others accountable for their actions, and may deter some instances of harassment.

In-Service Training

Because administrators and supervisors must be made aware of the issues and of their responsibility, the next step is to conduct in-service training sessions. At MSU, these in-service training sessions began at the vice-presidential level, proceeded to the deans' level, and are now being conducted at the unit level for faculty and academic and non-academic staff.

Two training instruments, a slide-tape presentation and a pamphlet, were developed specifically to support the MSU workshops, since most commercial audiovisual materials on sexual harassment refer to work environments in business and industry. The slide-tape presentation identifies diverse settings in which sexual harassment can affect students—in the classroom, during instructors' office hours, during graduate assistantships, in other student work settings—as well as situations of sexual harassment of faculty and staff. The pamphlet provides reference materials for audience members, and can be used as an independent educational tool.

Deane and Tillar (1981), Sandler et al. (1981), and the U.S. Merit Systems Protection Board (1981) recommend the development of such materials to inform victims and potential victims of sexual harassment of their rights and of appropriate actions to take, as well as to inform harassers about institutional policy, legal implications, and potential sanctions. In addition to the typical and generally recommended information about sexual harassment, the pamphlet includes a copy of a letter from a chairperson to the department faculty

outlining the university policy and requesting a faculty meeting to address this issue, and a resolution on sexual harassment unanimously supported by the faculty at the conclusion of this faculty meeting.

Discussions of the slide-tape presentation and information in the pamphlet constitute the major portion of the in-service training. For many administrators, the training session is the first opportunity they have had to learn about the seriousness and the consequences of sexual harassment. Since sexual harassment creates a stressful and often offensive, intimidating, or intolerable learning and working environment, administrators are informed that they will be held accountable for identifying and eliminating such barriers to full access to and participation in educational and professional endeavors.

During the sessions, special emphasis is placed on recent court cases and the national and state laws that designate sexual harassment as a form of sex discrimination prohibited by law and delineate the responsibility of institutions and administrators to have a policy and procedures for handling complaints of sexual harassment. Finally, the Equal Employment Opportunity Commission's (EEOC) guidelines are cited because they stress that employers "should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, and informing employees of their rights . . ." (Deane & Tillar, 1981, p. 27).

Support Assignments

The roles of university offices were reviewed and responsibility was assigned for specific tasks associated with the problems of sexual harassment. The Division of Women's Programs (DWP) has a primary responsibility for designing and implementing programs for women, and the staff is available as a resource to administrators. DWP provides a central location where they can seek technical assistance such as suggestions for sanction, further educate themselves about the dimensions of this problem, and improve their administrative skills for handling this problem. In a similar fashion, the DWP offers information about sexual harassment and the university's policies and procedures and provides support, encouragement and advocacy for individuals experiencing sexual harassment.

Many potential victims are unaware of the laws that protect them, the policies and responsibilities of the institution, and possible avenues for resolution.

Two other established resources at MSU are also available for both formal and informal complaint resolution. The Ombudsman's Office exists to handle student grievances covered by student rights and responsibilities documents (e.g., unfair grading practices, instructional activities, and criteria for assistantship assignments). The Anti-Discrimination Judicial Board (ADJB) provides informal resolutions and formal due process in all discrimination complaints and, consequently, is a resource available to individuals dissatisfied with the resolution at the unit level. Thus, the resolution system is designed to offer flexibility so that individuals with complaints of sexual harassment can find relief through informal resolution at the unit level, DWP, the Ombudsman's Office, and ADJB, or through a formal complaint registered either with the ADJB or in the Ombudsman's Office.

Information for Students and Employees

The fourth program component is information sessions on sexual harassment for students and employees. For the system to work effectively, potential and current victims of sexual harassment need to be aware of the university's concern and of the procedures established to handle incidents. Sandler et al. (1981), Deane and Tillar (1981), and Till (1980) list numerous reasons why women do not choose to report incidents of sexual harassment or to follow

complaints through to satisfactory resolution. Several are based on victims' assumptions about lack of institutional support and sensitivity to the trauma the victim experiences. Many potential victims are unaware of the laws that protect them, the policies and responsibilities of the institution, and possible avenues for resolution. Consequently, it is critical to announce publicly that the institution will not tolerate such behavior by its employees.

Monitoring and Evaluation

The fifth component consists of designing a system for monitoring and evaluating the personnel and programs established to identify and eliminate sexual harassment. First, the affirmative action program was reorganized in 1978 to include a strong emphasis on the responsibility of line administrators, a strategy recommended by Sandler et al. (1981) and the U.S. Merit Systems Protection Board (1981). The decision to hold administrators accountable created leverage from the top down to enforce the university's anti-discrimination policies, including the policy on sexual harassment. Leverage can include salary adjustments, retention of administrative position, and promotion possibilities. Thus, administrators must be evaluated on their knowledge of the policy and procedures, their implementation of the procedures, and the results of their efforts to identify and reduce the barriers to equality.

Another component in the evaluation of program effectiveness is assessing frequency and type of harassment which individuals experience (recommended by Sandler et al., 1981; Till, 1980). At MSU, a random stratified sample of 1,000 women graduate students and upperclass undergraduates was surveyed about their experiences in the classroom, in their assistantships, and in other work situations. The results of this survey indicate the estimated number of incidents, the types of harassment, and where incidents occurred (Maihoff, 1981; Maihoff & Forrest, 1983).

In addition, the sexual harassment pamphlet asks administrators to notify the DWP about complaints and their outcomes. Because the DWP is the campus unit designated as the contact point, informal statistical information is gathered for evaluation purposes. Evaluation and monitoring of the various components of the sexual harassment program are recommended to determine which program components are working effectively and which still require further institutional efforts (Deane & Tillar, 1981; Sandler et al., 1981; Till, 1980; U.S. Merit Systems Protection Board, 1981).

Issues and Problems

Complexities and difficulties have appeared as MSU has implemented its comprehensive sexual harassment program. Four areas of concern are discussed here.

Evaluation Paradigm

Difficulty exists in gathering thorough and accurate descriptive statistics about the use and effectiveness of the program. Since administrators are encouraged to handle sexual harassment complaints on an informal basis at the unit level, there is not a strong basis for a formal, university-wide reporting process. There is need for a reporting system that creates an attitude of trust in the administrator's abilities, once they have been fully informed of their responsibilities, to enforce the university's policy. Consequently, it is important not to create the atmosphere of mistrust often associated with detailed and continuous reporting, even though lack of these procedures jeopardizes the ability to gather important statistical information.

Qualitative information about the resolution process of individual complaints is equally significant, yet also difficult to gather. It is important to know about each complainant's persistence and satisfaction with the process (e.g., how the complainant was interviewed, the suggestions the complainant received about handling further interactions with the perpetrator) and the outcome—including sanctions to prevent the perpetrator from having further inappropriate influence on the individual's education or employment. In addition, unremediable effects on the individual's attitude about self and on the individual perceptions of opportunities for educational and professional development must also be assessed.

It is also important to know if individuals are withdrawing their complaints. Currently, the number of such cases and the reasons an individual might decide to withdraw are not known. Of concern are any reasons associated with the atmosphere of the department (e.g., public remarks that suggest that sexual relationships with professors are expected behavior for students) or with the experience of reporting the complaint (e.g., unnecessary questions verging on interrogation).

Even more difficult to document is the number of sexual harassment incidents that never come to the attention of an administrator. The reasons individuals do not come forward with a complaint may be associated with the general atmosphere of a department or the lack of public knowledge of the institutional policy and procedures. However, individuals may not be coming forward for other, more personal reasons (e.g., a spouse who would not understand). Thus, a problem remains: How can administrators identify individuals who have experienced sexual harassment but have not come forward to complain because of their perceptions of the department's attitude toward sexual harassment?

There are other questions. Is an administrator finding it relatively easy to identify and alleviate certain types of harassment (propositions in exchange for a grade or letter of recommendation), yet falling short of eliminating other types (e.g., continuous derogatory and demeaning jokes about female anatomy)? Is an administrator responding well to complaints, yet not initiating an affirmative plan to create an equitable learning environment, thus, perhaps supporting an attitude of acceptance for many behaviors that may be detrimental to equitable access and opportunity?

Non-observable Sanctions

The effectiveness of a sexual harassment program depends on the ability to establish trust between members of the women's community and the university. Questions arise when it is not possible to supply information about the resolution of individual complaints. Often, resolutions require mediation and personnel actions which cannot be made public because of laws or university policy. Within the context of the resolution of individual complaints, administrators must decide the appropriateness of sanctions and remedies based on available evidence and on the personnel actions available to the administration. Inclusion of the quality of the environment as an aspect of an affirmative action commitment permits university administrators to use salary raises as a way of recognizing compliance or noncompliance. Since salary adjustments are made on the basis of many factors besides one's commitment to affirmative action, a performance appraisal specific to sexual harassment is difficult to identify.

The effectiveness of a sexual harassment program depends on the ability to establish trust between members of the women's community and the university.

Other Affected Parties

The effects of sexual harassment extend beyond those who are directly involved in the incident. An area which requires further attention is the effect of consenting sexual relationships between students and faculty (or between employees) on others, and the potential intrusion of these personal relations into the public realm. Students have reported watching a professor reward a sexual partner with special access to opportunities that enhance educational achievements and professional advancement. Knowledge of the rewards for engaging in consenting sexual relationships with faculty or supervisors may have a "chilling" effect on the learning and work environment for those who choose not to participate in them.

Another affected group are the faculty and staff members with whom students may choose to share their emotional trauma related to sexual harassment. These "listeners" may learn of inappropriate faculty behavior, yet feel obligated

to keep the information confidential, especially if the student has not yet decided to report the harassing incident. These helping individuals may not feel prepared to deal with the depth of emotions or the complexity of decisions the students must make about how to handle the situation. In addition, the helping individual who hears and sees the trauma first hand may feel torn among desires to comfort the student, to support the student's own decision-making, and to report and correct the harassing situation. These helping individuals may experience some additional concerns both for the individual student and for the well-being of the learning environment.

Finally, the student who willingly consents to sexual relations with a faculty member may not be aware of the complexity of the situation and the potential negative consequences of such a liaison. Problems often arise when the student decides to end the relationship and only then recognizes the leverage that the faculty member has available. If the faculty member chooses to use institutional power (e.g., grades, teaching opportunities, letters of recommendation) rather than interpersonal power to sustain the relationship, this constitutes a form of sexual harassment. Such a situation presents a difficult problem for universities because the line between institutional and interpersonal power is often blurred. What one individual suspects is the misuse of institutional power, another argues is the evaluation of a student's academic performance on *solely* objective standards. Sexual relations between faculty members and students that are initially consenting provide an opportunity for the abuse of institutional power and raise the question: Are some students' educational and career opportunities being limited by the consequences of these relationships, and if so, do they constitute a form of sexual harassment? Similar potential problems exist in consenting sexual relationships between employees if one of the employees has supervisory responsibility for the other.

Diverse Expectations

Alternative strategies for organizational development must be considered in the implementation of an affirmative action program. The sequence and timing of actions must be carefully reviewed to maximize organizational impact. There are conflicts created by the diversity of expectations about the appropriate sequence and timing of actions and the effects of implementing a university policy on sexual harassment. Universities cannot control individual behavior to the extent sometimes requested or expected by constituent groups. Within a complex human organization, inappropriate actions will occur. The immediate objective is to sufficiently isolate individuals involved in harassment and exert peer pressure at the departmental level to deal effectively with the problem. It is necessary to differentiate those individuals who are acting in good faith but who may at times make an error in judgment that reflects negatively on the university's position from those individuals whose attitudes and values are not consistent with the university's policy on affirmative action and therefore are not acting in good faith. The sequence and timing of the program must meet organizational goals and in the long run should be consistent with those of constituent groups but may not directly respond to pressure from these groups at any one point in time.

Summary

This paper has focused on the factors that should be considered as a large institution implements a sexual harassment program. As with any program that affects attitudes and values, progress is often slow and for some painful, and requires sustained effort by many individuals. The experience at MSU suggests that the probability of success of programs to enhance equity is increased by the implementation of strategies for organizational change that are consistent with the structure and philosophy of the university.

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Establishing an Informal Grievance Procedure for Cases of Sexual Harassment of Students

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Although surveys on college and university campuses have indicated that sexual harassment of students is not uncommon, very few students use formal procedures to report instances of sexual harassment. This article presents a rationale and recommendations for establishing an informal grievance procedure.

Surveys on college and university campuses reveal that a fairly large number of students, especially women, have experienced various forms of sexual harassment[1], particularly from faculty members (Oshinsky, 1980; Sandler et al., 1981; Till, 1980). At the same time, all indications are that students are quite reluctant to make formal reports of sexual harassment. In view of the effects of sexual harassment on individuals and of the institutional liability involved, it is essential that colleges and universities devise reporting procedures that students will use.

Reactions to Sexual Harassment

Individuals respond differently to incidents of sexual harassment. Some become submissive because of concern about the consequences of not cooperating with the harasser. Among the consequences feared are embarrassing and denigrating remarks, lowered grades, severe criticism of course work, negative letters of recommendation, and delays of theses and dissertations.

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Another common reaction to sexual harassment is an attempt to escape the situation in order to avoid the harasser. Some students do this by dropping courses; others withdraw from school; still others change majors or alter career plans because of harassment. Some people cope with sexual harassment by ignoring the incidents with the hope that they will not recur (Till, 1980).

There also can be emotional and physical reactions to sexual harassment, such as depression, decreased motivation, listlessness, a sense of helplessness, insomnia, headaches, and other physiological complaints (Sandler et al., 1981).

Individuals who have experienced sexual harassment may be quite angry and embarrassed. In addition, some students report feeling disillusioned, because their inherent trust in faculty members has been betrayed. This sense of betrayal is especially strong when students have had respect and admiration for the faculty members who harass them.

Barriers to Reporting Sexual Harrassment

Incidents of sexual harassment remain unreported for a variety of reasons. One of the major reasons for this reluctance is

related to the dynamics that seem to occur in many cases of sexual harassment. The first question the individual usually asks after experiencing sexual harassment is, "Did the person really have something sexual in mind?" The next questions are likely to be, "Did I do something to elicit the behavior?" "Would anyone believe me if I were to report the behavior?" The final and most important question for the individual is, "Will I experience some form of retaliation if I do report the situation?" The concerns about being believed by others and about possible retaliation are paramount to persons considering whether to report sexual harassment incidents.

Some students do not report cases of sexual harassment because they believe no action will be taken against the harasser. Related to this belief is the sense of powerlessness many students feel in an academic institution, particularly in relation to faculty members. This sense of powerlessness is felt particularly by women students, the major victims of sexual harassment.

Some students do not report cases of sexual harassment because they believe no action will be taken against the harasser. Related to this belief is the sense of powerlessness many students feel in an academic institution, particularly in relation to faculty members.

An additional barrier to reporting sexual harassment is fear of the consequences of doing so. Some individuals are afraid they will have to have a face-to-face confrontation with the harasser. Others worry that their complaints will be made public and that they will encounter embarrassment as well as accusations that they elicited the behavior of the harasser.

Rationale for an Informal Grievance Procedure

As the result of a survey on sexual harassment conducted at the University of Florida in 1979, members of the university's Committee on the Status of Women began examining the university's procedures for dealing with cases of sexual harassment. One of the results of the survey that caused particular concern was the indication that more than 70% of the female respondents did not feel free to report incidents of sexual harassment to university officials (Oshinsky, 1979).

In response to the survey results and to an increase in the number of women students unofficially reporting instances of sexual harassment, the committee designed and recommended an informal grievance procedure to deal with cases of sexual harassment. An informal procedure was adopted because it was believed that such a procedure would encourage reporting of incidents, particularly if students realized that they would not be required to take specific actions against the harasser. The Committee also felt that an informal procedure would alleviate some of the fear about retaliation experienced by almost all of the students considering filing formal complaints.

It was also thought that such a procedure might sensitize both students and faculty to the implications and consequences of sexual harassment, and thus reduce instances of sexual harassment of students by faculty members.

The informal grievance procedure, which was adopted in 1979, designates two women, an assistant dean and an associate dean in the Office for Student Services, as contact people for students with complaints of sexually offensive behavior by faculty members. The deans talk with students and, if it is deemed appropriate, attempt to resolve the complaint on an informal basis. The resolution of many complaints involves working cooperatively with administrators in academic departments and colleges. Throughout the process, it is stressed that every possible effort is being made to insure confidentiality and to protect the rights of both students and faculty members. If resolution of a complaint cannot be reached

informally, students are advised about formal grievance procedures.

Experience with the informal procedure has shown that many students wish only to talk, in almost a cathartic way, with someone in an official position about incidents of sexual harassment. Other individuals primarily want a person in authority to be aware of the sexually offensive behavior of certain faculty members. These same students indicate that although they do not want to get faculty members "in trouble," they would like someone to force the particular faculty members to cease their sexually harassing behavior.

As was anticipated, there has been an increase in the number of students using the informal procedure to report instances of sexual harassment. Almost none of the students has decided to use the formal grievance procedure.

Recommendations for Establishing an Informal Grievance Procedure

Following are recommendations for establishing an informal grievance procedure to handle cases of sexual harassment of students:

1. A strong policy statement which indicates that sexual harassment in any form is inappropriate and will not be tolerated should be issued by the president of the institution.
2. When an informal grievance procedure is established, two or more professionals in student affairs (e.g., dean of students office) should be designated as persons to whom students may report incidents of sexual harassment. One of the major advantages of using student affairs staff is that it often will be less threatening for students to go to persons in an office that is not identified with a specific academic area and thus is perceived as being neutral. Such staff typically are viewed as individuals who help students deal with many areas of concern. The designated staff members must be viewed as persons who have credibility and power, and who are within the mainstream of the institution, so that their effectiveness will be believed by students, faculty, and other administrators.
3. In most situations, the designated persons should be women, since the majority of victims of sexual harassment are female students who probably will feel more comfortable talking with other women.
4. The designated staff members should be able to establish a nonthreatening atmosphere so that students can trust that they will be taken seriously and that the staff will follow through in whatever way the students request. It is also important that the students' fear of retaliation be diminished as much as possible.
5. Confidentiality for both students and faculty members needs to be maintained in order to protect the rights of all involved.
6. If feasible, the designated staff members should be available as consultants to the academic administrators who determine the nature and extent of penalties for faculty members, should students' complaints of sexual harassment be found to be valid. Academic administrators may wish to establish several alternatives for dealing with such faculty members, e.g., unofficial warning, letter of reprimand, requirement of psychological evaluation and/or counseling.
7. Female faculty members particularly should be made aware of the informal grievance procedure so that they can serve as referral sources to the designated staff members, since faculty women may be the first persons with whom students who have been harassed will talk.
8. Policies and procedures regarding sexual harassment should be widely and repeatedly distributed and publicized, so that students will know about sources of support as well as how to use the informal grievance procedure should they decide to report incidents of sexual harassment. This information can be disseminated through special brochures, articles in the student newspaper, and workshops and programs.

9. **Formal grievance procedures should be available and known to students who wish to file formal complaints about instances of sexual harassment.**

Sexual harassment is defined as unwanted sexual attention, usually from a person in a position of authority or power.

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Consensual Amorous Relationships Between Faculty and Students: Policy Implications and the Constitutional Right to Privacy

by
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INTRODUCTION

Growing awareness of the magnitude, dimensions, and effects of sexual harassment in educational institutions and the potential for institutional liability have prompted the adoption of policies to avert such problems. These policies can be found in the faculty and student handbooks of many private and public colleges and universities. They typically prohibit sexual harassment of employees and students and call to the attention of the university community the serious effects of sexual harassment and the potential for exploitation. Some universities have gone beyond regulations treating the widely litigated problems of sexual harassment and have also promulgated policies addressing the problematic issues of consensual amorous relationships between faculty and students. The University of Iowa, for example, adopted a policy that states:

> No faculty member shall have an amorous relationship (consensual or otherwise) with a student who is enrolled in a course being taught by the faculty member or whose academic work (including work as a teaching assistant) is being supervised by the faculty member.[1]

The policy further indicates that amorous relationships outside the instructional context may also lead to difficulties, but are not prohibited so long as the faculty member avoids participation in decisions that could penalize or reward the student.[2] The University of Minnesota does not forbid consensual relationships between faculty and students, but within its policy statement of sexual harassment it clearly states that such relationships are considered to be "...very unwise."[3]

The Faculty Senate of the University of California defeated a proposed amendment to the Faculty Code of Conduct which would have

declared it unethical for professors to engage in amorous relationships with students.[4] A similar proposal was also rejected by the faculty of the University of Texas at Arlington.[5] Some members of the faculty at both universities viewed the measure as addressing an issue that was "... none of the university's business."[6] A University of California professor suggested that restrictions on amorous relationships between faculty and students may be in violation of civil rights.[7] This comment highlights the potential conflict between concerns for preventing victimization of students through sexual harassment and concerns for an individual's right to enter into intimate relationships. This article explores this conflict as well as the potential legal ramifications of policies prohibiting consensual amorous relationships between faculty and students.

SEXUAL HARASSMENT IN GENERAL

The first sexual harassment case to come before the United States Supreme Court was Meritor Savings Bank v. Vinson.[8] While this case was brought under Title VII of the Civil Rights Act of 1964 [9] which addresses conduct in the workplace, analogies can be reasonably drawn between the supervisor-employee context and the relationship of faculty and students.

In Meritor, a former employee of Meritor Savings brought an action against the bank and her supervisor, claiming that during her employment she had been subjected to repeated demands by her supervisor for sexual relations, to which she unwillingly acquiesced. The Court's opinion is most often cited for establishing that an employee need not have suffered tangible economic injury to state a claim of sexual harassment under Title VII. An employee subjected to an offensive work

environment created by repeated harassment in the form of intimidating conduct and/or suggestive language may seek redress under Title VII. But perhaps the most significant implication of the Meritor case for college and university consensual amorous relationship policies is the Court's determination that voluntary participation by an employee in sexual intercourse with a supervisor is not a defense for the employer.[10] The focus of the inquiry is more importantly on whether the sexual advances of a person in authority are unwelcome rather than whether the participation in sexual conduct was voluntary.

Inherent in consensual relationships between supervisor and employee is the unequal power of the consenting parties. The Meritor Court recognized the dilemma of the employee who fears that failure or reluctance to comply with a supervisor's sexual demands may result in lack of advancement, demotion or loss of job. The power differential that exists between a supervisor and an employee may be seen as roughly analogous to the asymmetry of power between faculty and students. Students are keenly aware of their vulnerability in light of the wide discretionary power of faculty.[11] Whether intended or not, the fear of retaliation can influence a student to consent to sexual involvement with a professor. Students may consent to unwanted sexual liaisons because of uncertainty regarding the academic consequences of noncompliance. Therefore, what may appear to be an adult, consensual, private relationship may be the product of implicit or explicit duress and it may, thus, constitute the basis for individual or institutional liability.[12] Also, truly consensual relationships may undergo change and lead to rancor, disapppointment and retaliatory claims of sexual harassment.

Concern for protecting students and faculty and avoiding potential liability may encourage colleges and universities to consider a total ban on all amorous relationships between faculty and students. Such a ban, however, raises other legal issues unrelated to those concerning sexual harassment, and may, depending upon the public or private identity of the institution, raise constitutional issues as well.

CONSENSUAL RELATIONSHIPS

1. PRIVATE AND PUBLIC INSTITUTIONS

Actions by private colleges and universities to prohibit consensual intimate relationships between faculty and students would be treated similarly to private company rules prohibiting such relationships between managerial and non-managerial personnel. Court challenges to such rules have been unsuccessful, even though employees dismissed for violation of so-called "non-fraternization" rules have usually alleged wrongful discharge and tortious invasion of privacy.[13] For example, in Rogers v. IBM the plaintiff was discharged after fourteen years of service for engaging in a relationship with a subordinate employee that "exceeded reasonable business association."[14] The court reasoned that the dismissal was appropriate because an employer may be legitimately concerned with the appearance of favoritism, possible claims of sexual harassment, and employee dissension resulting from amorous relationships between management and nonmanagement employees.[15] A court has also cited federal regulations that state, "an employer should take all steps necessary to prevent sexual harassment from occurring,"[16] to further support the contention that companies have a legitimate interest in enforcing "no-dating" policies.

While employer-employee relationships in private institutions are

governed by contract principles and applicable state constitutional provisions, generally such institutions are not subject to the federal constitutional provisions which require state action. At public institutions, however, policies which seek to ban amorous relationships must take into account the principles which protect an individual's constitutional rights, since a public institution's enforcement of administrative policies constitute state action. Although the constitutional rights at issue in consensual amorous relationships may be thought to be First Amendment rights of association, they are more properly considered as protected under the penumbral right to privacy.

2. FREEDOM OF ASSOCIATION

The Eleventh Circuit Court of Appeals in Wilson v. Taylor, concluded that "... dating is a type of association which must be protected by the First Amendment's freedom of association."[17] In this case, Wilson, a police officer employed by the city of Winter Park, Florida, was dismissed for dating the daughter of a convicted felon, who was reputed to be a key figure in organized crime in Florida.[18] Relying on earlier First Amendment cases that recognized that freedom of association may apply to relationships which promote social and personal ties, rather than just those that advance political and religious beliefs,[19] the court held that the right of a public employee to date falls under the protection of the First Amendment. Thus, it was held that Wilson was fired for "... a reason infringing upon his constitutionally protected freedom of association."[20] The constitutional guarantees of freedom of association would appear to apply to policies which improperly prohibit consensual amorous relationships between faculty and students in public institutions.

One month after the decision in the Wilson case, the Supreme

Court, in Roberts v. United States Jaycees, [21] for the first time outlined the existence of two distinct associational freedoms under the Constitution: (1) expressive association and (2) intimate association. Roberts involved a challenge by the United States Jaycees to a Minnesota law that prohibited charitable organizations from barring women from membership. That court held that the state did not abridge either the male members' freedom of intimate association or their freedom of expressive association. The freedom of expressive association, according to the court, guarantees the right to "... associate for the purpose of engaging in those activities protected by the First Amendment: speech, assembly, petition for the redress of grievances, and the exercise of religion."[22] Intimate association is an intrinsic element of personal liberty,[23] not grounded solely in the First Amendment but secured in general by the Bill of Rights and the Fourteenth Amendment. The Court explained, in a line of its decisions which speak to the Constitutional right to privacy, that "choices to enter into and maintain certain intimate relationships must be secured against undue intrusion by the State." [24]

Roberts thus makes clear that the First Amendment freedom of association is not the proper focus of the analysis of the right to engage in intimate consensual relationships, free from governmental interference. Rather, it is the constitutional right to privacy that must be considered when universities contemplate restricting the personal associations of faculty and students. The Eleventh Circuit's reliance on the First Amendment in Wilson may have been inappropriate, but the concept of the "right to date" recognized by the Court in Wilson should still be entitled to constitutional protection under the fundamental right to privacy.

3. RIGHT TO PRIVACY

While the right to privacy is not explicitly mentioned in the Constitution, numerous Supreme Court decisions rest on this principle and explain its scope. One of the earliest statements of the fundamental right to privacy appears in the dissenting opinion of Justice Louis Brandeis in Olmstead v. United States.[25] This case dealt with the gathering of criminal evidence by the government through the use of unauthorized wiretapping. The majority of the Court found that no violation of the defendants Fourth or Fifth Amendment rights resulted from this practice. The Brandeis dissent stated that "the makers of the Constitution...conferred, as against the government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized man."[26] This dissent was later relied upon to overrule the case.[27].

Two cases, Meyer v. Nebraska [28] and Pierce v. The Society of Sisters,[29], contemporary with Olmstead, are cited as supporting the idea that personal privacy is implicit in the concept of liberty protected by the Fourteenth Amendment. In Meyer, the Court invalidated a statute which made it illegal to teach a foreign language to any child who had not completed the eighth grade. In Pierce, the Court struck down an Oregon law requiring compulsory attendance of children in public school. While neither case specifically found a constitutional right to privacy, the recognition of a liberty interest in family-related matters, such as child rearing and education, became the foundation of the more modern recognition of a constitutional right to privacy.

Not until 1965, in Griswold v. Connecticut,[30] was the privacy concept identified as an independent constitutional right. In this case,

a Connecticut statute forbidding the use of contraceptives by married persons was declared uncontitutional. Justice Douglas, writing the majority opinion, considered the constitutional right to privacy to have roots in the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments.[31] Other Justices believed that the right to privacy emanated from the Ninth Amendment or the concept of personal liberty in the Fourteenth Amendment.[32] Although the specific textual source of the constitutional right to privacy may still be debated, a line of Supreme Court decisions, beginning with Griswold, clearly establishes an independent constitutional right to privacy, the scope of which is still being explored and defined. In Griswold, Justice Douglas held that marriage is a relationship that lies within the zone of privacy created by the emanations of several fundamental constitutional guarantees. He further explained the constitutional protection surrounding the marital relationship:

> We deal with a right of privacy older than the Bill of Rights--older than our political parties, older than our school system. Marriage is coming together for better or for worse, hopefully enduring, and eminent to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[33]

Two years later, in Loving v. Virginia,[34] which involved an equal protection challenge to a Virginia statute prohibiting interracial marriages, the Supreme Court strongly reiterated that a constitutional protection surrounds marriage. "The freedom to marry has long been recognized as one of the vital personal rights essential to orderly pursuit of happiness by free men."[35] Seven years after Griswold, in Eisenstadt v. Baird,[36] the Court extended the zone of privacy beyond the protection accorded to marital relations. The Court invalidated a statute which made it illegal to distribute contraceptives to unmarried persons.

> If the right of privacy means anything, it is the right of the individual, married or single to be free of unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[37]

Given the emphasis placed by the Court on the interrelationship between the right to privacy and marriage and child-bearing, the formation of consensual intimate relationships, viewed as natural precursors to the more formal bond of marriage, should similarly be protected by the right to privacy. Otherwise, it may be argued that the specific rights of privacy previously announced by the Courts are hollow.

It has been suggested that the right to privacy may be the "... least stable terrain of modern constitutional doctrine."[38] However, there is little doubt that Americans seem to believe that their civil

rights include the right to engage in highly personal relationships free from governmental intrusion.[39] In our daily lives, the value of intimate association "... looms larger than the value of freedom of expression or political association."[40] In the context of policies that prohibit faculty-student dating, the immediate reaction by many faculty is that such policies constitute a violation of civil rights, which reflects the "natural law" quality of the right to privacy.

The Court has recently been hesitant to expand the substantive reach of the right to privacy. This may be attributed in part to an effort to avoid the appearance of reviving the judicial activism associated with the 1930's and, thus, appearing to make laws without express constitutional authority.[41] This concern is reflected in the 1986 Supreme Court opinion in Bowers v. Hardwick.[42] This challenge to Georgia's criminal sodomy statute gave the court another opportunity to define the scope of the right to privacy. Justice White, writing the majority opinion, commented that, "the court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution ..."[43] While deciding that the Constitution confers no right upon homosexuals to engage in sodomy, the Court did reaffirm the privacy rights previously recognized by the Court, rights that touch upon traditional family matters. Restrictions on dating, unlike the prohibition of sodomy, would render meaningless the Court's reaffirmation of privacy rights that relate to family matters. The Bowers opinion is restricted to the power of the State to proscribe specific sexual acts. This does not imply a state power to intrude on the rights of adults to establish consensual relationships.

With issues involving the right to privacy and consensual dating policies, the analysis of the Court in Roberts v. United States Jaycees is instructive. As noted, the court distinguished the freedom of intimate association from that of expressive association. It also made an effort to characterize the personal affiliations that come under the shelter of the Constitutionally protected freedom of intimate association and right to privacy. These relationships are "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[44]

The Court described the spectrum of human relationships from the smallest and most selective and seclusive, at one end of the spectrum, to large business enterprises, at the other.[45] Where a specific relationship is located on this spectrum will determine the limits of State authority to interfere with such associations.[46] Intimate consensual relationships, by most definitions, may well be considered relationships that require a high degree of selectivity, smallness, and seclusiveness. Under the analysis in Roberts, an amorous relationship formed by two adults would be most likely situated at the end of the spectrum that affords the greatest claim to constitutional protection from incursions by the State.

The right of privacy is not, however, absolute. As with any constitutionally guaranteed individual right, a compelling state interest may permit certain infringements of that right. Laws which limit the fundamental freedoms of an individual must not only serve a compelling state interest but must be narrowly drawn to serve only that interest.[47]

In the context of an educational institution, such compelling interest may exist. Case law, however, has not been very helpful in this regard. The courts have not properly addressed these issues or have been able to avoid them by focusing on the unique facts or egregious behaviors involved in certain cases.

CONSENSUAL AMOROUS RELATIONSHIPS BETWEEN STUDENTS AND THEIR TEACHERS--CASE LAW

In a New York case, Goldin v. Board of Education, [48] a high school guidance counselor claimed that his constitutional right to privacy was violated when school officials sanctioned him for his sexual relationship with a former student.[49] The teacher was suspended without pay, when it was discovered that he had spent the night at the home of a former student while her parents were away. This action was taken pending a hearing. The student was over 18 years of age and had graduated two months prior to the incident.[50] The court upheld the suspension but did not express any opinion regarding the ultimate outcome of the hearing.[51] The majority opinion stressed that the main focus of the hearing should be "... whether the plaintiff used his position as a teacher to establish the relationship and whether the relationship has adversely affected the plaintiff's fitness as a teacher within the community."[52] The teacher's recent professional supervision of the student made his conduct "... susceptible to the presumption that the intimate relationship did not develop overnight."[53] A teacher's guarantee of privacy may yield to the valid government purpose of inquiring into "... the character and integrity of its teachers in the educational process."[54]

The dissenting judge reasserted that this incident involved a

consenting intimate relationship between a teacher and a former adult student, that took place in a private residence. Without any proof that the teacher used his position of supervision over the student to establish a "meretricious relationship", the plaintiff is entitled to protection from inquiry under the principle enunciated in Griswold.[55] The dissent also noted that "... it is apparent that proof of such prior relationship is not available to the board or it most certainly would have been the subject of another and separate charge."[56]

Both the majority and the dissent would confine the proper scope of inquiry, at the Board of Education's hearing, to the teacher's activities when the student was still under his educational guidance. Thus in this case, the scope of appropriate state interference with a protected right was limited to the academic setting. The court recognized a legitimate school board concern that intimate relationships between teachers and students may undermine the confidence of students and parents in the integrity of the teachers and the school. However, to justify the inquiry into a seemingly consensual relationship between two adults, outside the school, the court was willing to indulge the inference that the relationship may have been initiated earlier as a teacher-student romance. Without this presumption, the Board of Education's actions may be in violation of the teacher's right to privacy.

Few would argue that in a high school, as opposed to a post-secondary institution, there are factors, such as the age and maturity of the students, that make a broader scope of inquiry permissible. The place of the high school in the community also requires greater awareness of and sensitivity to local public opinion. The interest of the Board of Education in maintaining an atmosphere that

preserves the integrity of the educational process overrides the right of the teacher to be let alone.[57] The parameters of permissible infringement on the constitutional right to privacy are a function of the setting in which this right is asserted. Therefore, in an elementary or secondary school setting, broad proscriptions regarding amorous relationships between faculty and students may be both wise policy and constitutionally permissible action. However, in the post-secondary public institution such proscription may be subject to a different constitutional test.

Cases arising out of incidents of consensual sexual relationships between faculty and students in institutions of higher education may also involve allegations of sexual harassment or such egregious behavior on the part of the faculty person as to compel the school to take action. The decisions of the courts often focus on the latter, thus making it difficult to discern the limits of permissible infringement on the rights of faculty and students to private relationships. For example, Board of Trustees v. Stubblefield [58] arises out of patently outrageous behavior on the part of a professor at a junior college. The professor offered to drive a student home after an evening class. On the way, the professor parked the car on a public street and engaged in sexual relations with the student.[59] When the local Sheriff approached the car, the professor shouted expletives and sped away, knocking down but not seriously injuring the sheriff. The student had to force the professor to bring the vehicle to a stop.[60] The decision to dismiss the professor was upheld by a California court on the basis of the professor's unacceptable behavior in response to the sheriff's approach and the notoriety surrounding the incident that was likely to impair the professor's ability to carry out

his academic role.[61] Additionally, the court viewed this apparently consensual sexual relationship as threatening to "the integrity of the educational system under which teachers wield a considerable power in the grading of students and the granting or withholding of certificates or diplomas..."[62] While the court articulates the legitimate concerns of the state regarding amorous involvement of faculty and students, in general, this is not at the heart of the court's decision. The court was clearly more concerned with the professors bizarre behavior in his encounter with the sheriff.

In Korf v. Ball State University,[63] an associate professor of music was accused by current and former students of making unwelcome homosexual advances and offering good grades for sexual favors. Professor Korf denied the allegations but admitted having sex with one of the students. He characterized this relationship as consensual.[64] Korf claimed that the university, in dismissing him, violated his constitutional rights to substantive and procedural due process, equal protection, free speech, freedom of association, and privacy. In addition, under state law, Korf claimed breach of contract and infliction of emotional distress.

On appeal to the Seventh Circuit, all the professor's claims were dismissed, despite the fact that Ball State University had no specific policy regarding intimate relations between faculty and students. The university relied on a statement of the American Association of University Professors (AAUP), which it had adopted and printed in the Faculty Handbook:

> 1) The professor, guided by a deep conviction of the worth and dignity of the advancement of knowledge recognizes the

special responsibilities placed upon him ...

2) ... He demonstrates respect for the student as an individual and adheres to his proper role as intellectual guide and counselor...[65]

A hearing committee at the university found evidence to support the charge that Korf was guilty of unethical conduct because he "used his position and influence as a teacher to exploit students for his private advantage."[66] The testimony and affidavits of the students alleged quid pro quo harassment. The court also addressed the possibility that one of the relationships was consensual, finding no proof to the contrary.[67] Nonetheless, the court held that such relationships are a breach of the professor's ethical obligations under the AAUP guidelines.[68]

As in Stubblefield, the determination that the professor breached his ethical obligations was not necessary to support the decision of the court. In Korf, the testimony of seven other students clearly implicated the professor in sexual harassment and exploitive conduct. Once again, this case does not present an adequate framework for defining the extent of constitutional protection in consensual relationships between faculty and students in institutions of higher education.

Korf also claimed that it was the homosexual nature of the relationship that led to his dismissal, in violation of his right to equal protection. However, the record failed to provide any suggestion that "... the university would hesitate to discharge a professor who acted in a manner similar to Dr. Korf but directed his or her advances towards students of the opposite sex rather than the same sex."[69] The court

rejected Korf's equal protection claim as having no legal or factual basis. However, the court left unanswered the question of whether homosexuals would indeed have a valid equal protection claim.

In 1984, a Louisiana Federal court was faced with a case of consensual adult sexual relationship with no allegations of harassment or outrageous public misconduct, unlike the circumstances in Goldin, Stubblefield, and Korf. In Naragon v. Wharton, [70] the plaintiff, a music instructor at Louisiana State University, was having a lesbian relationship with a freshman student over 18 years of age. The instructor was not in a position to evaluate, recommend, or otherwise affect the academic progress of the student. The student was in none of the instructor's classes and was unlikely to ever be in these classes in the course of her studies.[71] While the student never lodged a complaint against the instructor, the student's parents expressed their concern to university officials. When the Dean of the Music School and the Vice-Chancellor for Student Affairs investigated the matter, the instructor informed them that her relationship with the student, who was not in any of her classes, was a private matter and none of the university's business.[72] No action was immediately taken by the university and, at the end of the term, a faculty committee recommended continuation of the assignment of the instructor to teaching duties.[73] However, the university administrators, ultimately responsible for appointments, decided that it was in the "best interests of the university" to relieve the instructor of teaching assignments and reassign her to research activities.[74]

The university had no written policy which prohibited amorous relationships between faculty and students. Instead, it relied on general

standards of professional conduct and ethics, assuming that it was an obvious criterion of the academic profession to avoid intimate relationships with students.[75]

The instructor, Naragon, sought an injunction to compel the university to restore her teaching duties. The instructor's appointment ended at the close of the term and, therefore, there was no legal obligation on the part of the university to renew her employment. Naragon alleged a variety of violations of her constitutional rights, including the right to association under the First Amendment and the right to equal protection under the Fourteenth Amendment. The court viewed all Naragon's constitutional claims as bound up with the issue of whether the decision of the university was based on Naragon's sexual preference. The plaintiff alleged that she was treated differently from heterosexuals in the same situation.

The trial court and the court of appeals found no evidence that the reassignment was motivated by considerations of sexual preference.[76] Therefore, the court did not resolve whether the "Equal Protection Clause of the Fourteenth Amendment prohibits or circumscribes discrimination based upon an individual's sexual preference."[77] While the court never explicitly addressed the instructor's constitutional right to privacy, nonetheless, much of the court's analysis of the university's actions speaks implicitly to this issue. The court tried to examine the interests of the university which may override the right of the instructor to engage in intimate relationships free from interference. The university asserted that its decision to reassign Naragon was based on the belief that intimate relationships between teachers and students are unprofessional and likely to be detrimental to the students and to the

university. The court stated that the university is legitimately concerned

> ... that a romantic relationship between a teacher and student may give the impression of an abuse of authority; it may appear to create a conflict of interest even if in fact no such conflict directly results; it tends to create in the mind of other students a perception of unfairness; it tends to and most probably does affect other students' opinions of the teacher ...[78]

The inherent assymetry in faculty-student power is manifest primarily in the instructional context, which includes course work, advisorship, student evaluations, recommendations, and other similar processes. When amorous involvement and academic responsibilities intersect, the meaningful consent of a student to an intimate relationship is suspect. The voluntary nature of the association cannot be assured. Even when no coercion is intended by the faculty person, these concerns are still valid. When a faculty member is not in academic supervision of a student, however, these concerns cannot be entirely substantiated.

In Naragon, the university's concern over the appearance of abuse of authority and potential harm to the university's mission resulting from faculty-student amorous relationships would be compelling only in the instructional context, where the risk of harm is greatest. However, Naragon's relationship with the student occurred outside the instructional

context and, therefore, it is reasonable to argue that potentially coercive factors did not taint the relationship.

If one accepts the university's contention that any amorous relationships between faculty and students are unethical [79], then serious inconsistencies emerge in Naragon. The Dean acknowledged that in a well-known heterosexual, teacher-student relationship no action was taken and no sanctions imposed.[80] The justification of this inaction was that the student involved in the heterosexual relationship had been previously married, that her parents were aware of the relationship, and that no complaints were lodged. In Naragon, the only complaints lodged were those of the parents of the adult student.

It may be argued that the university interfered improperly in a private relationship in Naragon, without sufficient compelling interest. The court's determination that no constitutional violation was present may have turned on the fact that the deprivation imposed by the university action was minimal. Naragon was given an equivalent position in research, rather than teaching, with no economic loss or significant damage to her career. The university's action, however, had the effect of foreclosing Naragon's opportunity to teach, solely because of a consensual adult relationship in violation of Naragon's right to privacy..

DEFINING THE LIMITS OF THE PROHIBITION ON INTIMATE ASSOCIATIONS

Upon examination of the line of Supreme Court decisions which define the constitutional right to privacy, it appears that the foregoing consensual relationship cases pose privacy questions not adequately addressed by the courts that decided them.Roberts v. United State Jaycees [81] describes the characteristics of intimate association, i.e., smallness, selectivity, and seclusiveness, which confer upon it the right

to privacy. This right places constraints upon the power of the state to interfere in such intimate associations. Once a right to privacy is estabished as protecting consensual amorous relationships between faculty and students, public universities, as state actors, may only intrude upon these relationships in order to serve compelling interests.

In the landmark abortion case, Roe v. Wade [82], the Court deemed it appropriate for the state to interfere with the mothers right to elect an abortion only during a limited time period in the pregnancy. A time line is thus used to delineate the boundary of permissible state regulation in areas otherwise protected by the mother's right to privacy. The time line in Roe v. Wade illustrates where it is appropriate for the state to regulate areas protected by the right to privacy. An analogous approach could be adopted to establish the permissible limits of university regulation of intimate consensual relationships between faculty and students. In the university setting, a situational rather than a temporal paradigm should be applied. The overall university setting may be viewed as a large circle encompassing all its activities and interrelationships. Within the larger circle, a smaller circle sets off the activities and interrelationships that fall within the instructional context.

Intimate associations between faculty and students, that arise within the zone of instruction, carry the presumption of coercion and render the consensual nature of the relationships suspect. The university has a compelling interest in preserving its academic integrity and safeguarding the students from duress and exploitation. Within the

instructional context, a student may feel compelled to enter into and continue in an undesired intimate relationship with a faculty member, for fear of adverse academic consequences of non-compliance, even when such duress is not intended by the faculty member. Other students may also assume that such relationships can result in unfair academic advantage. Such perceptions may damage the academic climate. Since it is difficult to determine the exact nature of such relationships, the university may legitimately proscribe all such associations.

Outside the instructional context, the presumption that an intimate faculty-student relationship is the product of coercion cannot be justified. Since the faculty member is not in academic supervision of the student, there is no reason to question the consensual nature of the association. The faculty person cannot use the threat of reprisal or the promise of reward, in the academic context, to manipulate the student. There would also be no reason for others to suspect academic favoritism. Consequently, proscribing such relationships would serve no compelling interest.

A bright-line test can be formulated for public universities, defining the area of permissible state intrusion into constitutionally protected private relationships. The university may proscribe the formation of intimate faculty-student relationships within the instructional context, namely, when the faculty member is in academic supervision of the student. Intimate consensual relationships falling outside the instructional context are constitutionally protected from interference by the university.

Applying this suggested bright-line test to the facts in Naragon, it appears that the instructor's constitutional right to privacy was

impermissibly infringed upon by the university. The relationship between the instructor and the student arose outside the instructional context, there were no allegations of harassment or exploitation, and the court noted that it was highly unlikely that the instructor would ever be in academic supervision of this student. Consequently, the university had no right to intervene.

The bright-line test suggests the constitutional minimum which public institutions may incorporate into a policy. Other concerns, however, may need to be addressed before an amorous relationship policy is adopted. Frances Hoffman writing in the Harvard Educational Review, discusses some of the implications of amorous relationship policies.[83] Hoffman believes that amorous relationships between faculty and students are, in general, inappropriate and risky and they are always inappropriate when there is an abuse of power.[84] She suggests, however, that policies should not "...reinforce status hierarchies and ignore or deny the right of individuals to establish relationships when, with whom, and where they choose."[85] The paternalistic attitude of amorous relationship policies runs counter to two decades of the abandonment by higher education of the in loco parentis role.[86] Women students have a strong interest in protecting their right to forge alliances with faculty, in order to generate personal ties of trust and friendship which are crucial for personal and political strength within an organization and beyond. "It is not in women's interest to concede to institutions the right to delimit the formation of personal ties among community members."[87]

The entire definition of amourous relationships is fraught with ambiguity, which may result in a further chilling effect on mentorship and the social interactions that are part of a nurturing academic environment.

Policy makers should, therefore, carefully delineate the realm of unacceptable behavior, which is not a simple task. Consequently, some institutions may choose to have no explicit policy and others may prefer to articulate a very general statement with no mention of sanctions.

CONCLUSION

The freedom to decline or resist intimate association is inextricably bound up with the freedom to form intimate association. There may be inherent conflict in upholding both these freedoms in the university setting. Clearly, "... coerced intimate association is the most repugnant of all forms of compulsory association."[88] However, the right to form adult consensual intimate relationships is a fundamental personal freedom. A strong and effective university policy against sexual harassment, together with the recognition of the right to privacy of faculty and students, will serve both the interests of the university and those of the individual, within the parameters of constitutional guarantees.

Endnotes

1. University of Iowa, Policy on Sexual Harassment and Consensual Relationships, Division 2, Section 7, "Consensual Relationships in the Instructional Context," 1986.
2. Id., section 8.
3. University of Minnesota, Policies and Procedures on Sexual Harassment, "Policy Statement on Sexual Harassment," approved by University Senate, May 17, 1984.
4. Chronicle of Higher Education, Sept. 3, 1986, at 44.
5. L. McMillen, , "Many Colleges Taking a New Look at Policies on Sexual Harassment," Chronicle of Higher Education, Dec. 17, 1986, p. 1,16.
6. Id. at 16.
7. Chronicle of Higher Education, Sept. '86 at 44.
8. _____ U.S. _____, 106 S.Ct. 2399 (1986).
9. 42 U.S.C. Secs. 2000e et. seq.
10. Meritor, 106 S.Ct. at 2406.
11. N. Tuana, , "Sexual Harassment in Academe: Issues of Power and Coercion," College Teaching, vol. 33, no. 2. p. 53-63, at 58.
12. M. Wyatt, , "Avoiding Sexual Abuse Claims After Meritor, The National Law Journal, Oct. 27, 1986, at 19, Col. 1.
13. Rogers v. IBM, 500 F. Supp. 867 (W.D.Pa. 1980); Ward v. Frito Lay Inc.,- 290 N.W.2d 536, 95 Wis.2d 372 (1980); Crossier v. UPS, 150 Cal App.3d 1132, 198 Cal. Rptr. 361. (1983).
14. 560 F. Supp. 867.
15. Id. at 869; see also Crossier v. UPS, 150 Cal. App.3d at 1140.

16. Crossier v. UPS 150 Cal. App.3d at 1140 citing C.F.R. Sec. 1604.11(f).

17. 733 F.2d 1539 (11th Cir. 1984), at 1544.

18. Id. at 1540.

19. Id. at 1543.

20. Id. at 1545.

21. 468 U.S. 609 (1984).

22. Id. at 618.

23. Id.

24. Id. at 617.

25. 277 U.S. 438 (1928).

26. Id. at 478.

27. Katz v. U.S., 389 U.S. 347, at 471 (1967).

28. 262 U.S. 390 (1923).

29. 268 U.S. 510 (1925).

30 381 U.S. 479 (1965).

31. Id. at 484.

32. Id. at 487 (Goldberg, J., concurring) (Ninth Amendment); see also Roe v. Wade 410 U.S. 113 (1973) at 153 (Fourteenth Amendment).

33. 381 U.S. at 486.

34. 388 U.S. 1.

35. Id. at 12.

36. 405 U.S. 438 (1972).

37. Id. at 453.

38. Karst, K., The Freedom of Intimate Association, 89 Yale L.R. 624 at 625. (1980).

39. Id.

40. Id. at 655.

41. Id. at 664.

42. _____ U.S. _____., 106 S.Ct. 2841 (1986).

43. Id. at 2846.

44. 486 U.S. at 620.

45. Id.

46 Id.

47. See Griswold v. Connecticut 381 U.S. at 485; Roe v. Wade 410 U.S.113 at 155; Eisenstadt v. Baird 405 U.S. 438 at 463, 464 (1972). In Roe v. Wade the constitutionality of a state criminal abortion statute was challenged. The Supreme Court, in striking down this statute, decided that the statute violated the implicitly guaranteed constitutional right to privacy. The Court determined that the fundamental right to privacy is broad enough to encompass the right of a women to decide whether or not to terminate a pregnancy. 410 U.S. 113 at 154. However, the right is not unqualified. The Court acknowledges that some state regulations in the areas protected by the right to privacy are appropriate. id. at 153, 154. In its efforts to define the area of appropriate govenrmental regulation, the Court took into account the stage of the pregnancy at whiich the abortion is performed. The mother's right to privacy is paramount in the first trimester. After the first trimester, the state's interest in protecting the health of the pregnant women and protecting the potentiality of human life becomes more compelling as the women approaches term. id. at 160-162. The Texas abortion statute, which was being challenged in Roe v. Wade, was found to sweep too broadly

48. 357 N.Y.S. 2d. 867 (1974).

49. Id. at 869.

50. Id. at 869.

51 Id. at 873.

52. Id. at 872.

53. Id. at 870.

54. Id. at 872.

55. Id. at 873.

56. Id. at 873

57. Id. at 872.

58. 16 C.A. 3d 820, Cal. Rptr. 318 (1971).

59 Id. at 823.

60. Id. at 823.

61. Id. at 826.

62. Id. at 827.

63. 762 F.2d 1222 (7th Cir. 1984).

64. Id. at 1224.

65. Id. at 1227.

66. Id. at 1224.

67. Id. at 1227.

68. Id. at 1227.

69. Id. at 1229.

70. Naragon v. Wharton, 737 F. 2d 1403 (5th Cir. 1984).

71. Naragon v. Wharton, 572 F. Supp. 1117 (M.D. La. 1983) at 1119.

72. Id. at 1119.

73. Id. at 1120.

74. Id. at 1120.

75. 737 F 2d at 1405.

76. 572 F. Supp. at 1124; 737 F. 2d 1406.

77. 737 F 2d at 1408 (Goldberg, J. dissenting).

78. 572 F. Supp. at 1121.

79 737 F. 2d at 1405.

80. Id. at 1406.

81. 468 U.S. 609.

82. The Supreme Court in Roe v. Wade delineated the boundaries of permissible state interference in another circumstance involving the right to privacy, namely, a pregnant woman's right to elect an abortion. The Court placed the interest of the individual versus the compelling interests of the state on a time line. In the first trimester of pregnancy, the right of the individual to chose to terminate the pregnancy is paramount, as there is little or no risk to the mother and the fetus is not viable. In the second trimester, the important and legitimate state interest in protecting the health of the woman may abridge the individual right ot the mother. Thus, the state is permitted to regulate abortion to the extent that it will protect and preserve maternal health. 410 U.S. at 160-162. In the last trimester of pregnancy, the interest of the state in protecting fetal life, after viability, permits the state to go as far as to proscribe abortion.

83. F. Hoffman, "Sexual Harassment in Academia: Femminist Theory and Institutional Practice," Harvard Educational Review, vol. 50, n.2, May 1986, 105 -114.

84. Id. at 114.

85. Id. at 114.

86. Id. at 112.

87 Id. at 115.

88. Karst, supra note 41 at 638.

II. SAMPLE STATEMENTS AND POLICIES

HARVARD UNIVERSITY

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Sexual Harassment Policy and Information for Students and Faculty Faculty of Arts and Sciences

The Faculty of Arts and Sciences seeks to maintain a learning and work environment free from sexual harassment. Sexual harassment is a barrier to the educational, scholarly, and research purposes of the University.

The determination of what constitutes sexual harassment will vary with the particular circumstances, but it may be described generally as unwanted sexual behavior, such as physical contact or verbal comments or suggestions, which adversely affects the working or learning environment of an individual.* The Faculty of Arts and Sciences has formal complaint procedures for sexual harassment involving abuse of authority or for the sexual harassment of students by other students.

Any member of the FAS community who believes that he or she has been sexually harassed is encouraged to bring the matter to the attention of an appropriate officer of the Faculty.

Counselling, Advice and Informal Resolution

Problems, questions and grievances can be brought to and discussed with anyone in a supervisory position -- an instructor, head tutor, tutor, department chairman or dean. Some officers of the Faculty, however, are particularly well-informed and well-placed to help with problems of sexual harassment. These officers may be especially useful in advising and aiding a person's own offorts to resolve a problem.

Undergraduates may seek the help of any Senior Tutor, Master, Senior Advisor, or the designated Assistant Dean of Harvard College.
Graduate students may consult the Assistant Dean for Student Affairs or an appropriate departmental officer.
Faculty members may see an Equal Employment Opportunity Officer.

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* The guideline definition of the Equal Employment Opportunity Commission is as follows: "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for empolyment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or of creating an intimidating, hostile or offensive working environment."

Any of the above-named officers is prepared to help. Throughout the advising process, information will ordinarily be held by these officers in confidence until the initiating individual agrees that a third party or parties must be informed to facilitate a solution. These officers may be sought out for information on the formal complaint procedures.

Anyone with an inquiry, complaint, or concern is welcome to bring another member of the FAS community to discussions with a designated officer.

No person will be reprimanded or discriminated against in any way for initiating an inquiry or complaint in good faith. It is also the Faculty's policy to protect the rights of any person against whom a complaint is lodged.

Once an inquiry or complaint is brought forward, every effort will be made to resolve the problem within a reasonable period of time.

Formal Complaint Procedures

Anyone who believes himself or herself to be the object of sexual harassment involving an abuse of authority may choose, either initially or after having sought a resolution through one of the officers described above, to bring a complaint through the Faculty's formal procedures, with the possible outcome of disciplinary action against the accused. These procedures are described below.

Complaints about the harassment of students by other students should be brought to the attention of the appropriate Administrative Boards through a Senior Tutor or Senior Adviser (undergraduates) or departmental Graduate Adviser (graduate students).

Coordination, Education and Training

Designated officers serving each of three groups (undergraduates, graduate students and faculty) will work in a coordinating committee to inform the FAS community about the resources available for problem-solving, mediation and the resolution of grievances involving sexual harassment. The committee will also undertake a program of training for advisers who are likely to encounter questions or concerns about sexual harassment.

Procedures for Filing Formal Complaints In Cases of Sexual Harassment Faculty of Arts and Sciences

The Faculty has approved specific procedures for the resolution of complaints of sexual harassment. Informal counseling and mediation are always available for solving problems of sexual harassment in personal, instructional, and professional relationships. The formal procedures for disciplinary action outlined below are the means through which a complaint may be filed when sexual harassment involves an abuse of the authority delegated to an officer of the Faculty or to an instructional assistant. Complaints about the sexual harassment of students by other students should be brought to the attention of the appropriate Administrative Boards through a Senior Tutor or Senior Adviser (undergraduates) or departmental Graduate Adviser (graduate students).

At each step, the Faculty's procedures seek to protect, insofar as possible, the privacy of individuals involved in complaint. Both in fact-finding and in the final disposition of a complaint, every effort will be made to carry out procedures confidentially.

Individuals who wish to bring a complaint should contact one of the investigative officers designated by the Dean of the Faculty. It should be emphasized that merely discussing a complaint with one of these officers does not commit one to making a formal charge. (Formal procedures are initiated by the filing of a petition, which is a written and signed complaint to be shown to the accused person.)

For undergraduate students, the investigative officer is the designated Assistant Dean of Harvard College.
For graduate students, the officer is the designated dean in the Graduate School of Arts and Sciences.
For faculty members, the investigative officer is the Associate for Academic Planning.

N.B. Any one of the investigative officers named above may be appointed to investigate a complaint if the designated officer encounters a conflict of interest or of time. Other investigative officers may be designated as needed.

Prompt reporting is strongly urged, as it is often difficult to trace the facts of an incident or incidents long after they have occurred. Ordinarily, complaints must be brought to the attention of an investigative officer within ninety days of the incident or incidents.

Use of the internal procedures outlined below does not foreclose subsequent legal action. Complainants may wish to obtain legal advice as they consider the courses of action open to them. However, the proceedings described below are not those of a court of law and the presence of legal counsel is not permitted during these discussions.

Complainants may wish to have present at discussions of the complaint another member of the FAS community.

A permanent, written record of the formal complaint process and its outcome is retained by the Dean of the Faculty.

Throughout the complaint process, every effort will be made to protect the complainant from reprisals and to protect the accused (hereafter referred to as 'respondent') from irresponsible complaints.

The penalties for sexual harassment depend on the nature of the offense. Sanctions may range from reprimand to dismissal.

Procedures for Students and Members of the Faculty

1. Undergraduates, graduate students and members of the Faculty may bring formal complaints to designated officers; ordinarily, the Assistant Dean of Harvard College for Coeducation will investigate complaints from undergraduates, the Dean of the Graduate School will deal with complaints from graduate students, and the Assoicate Dean for Academic Planning will undertake the investigation of complaints from members of the Faculty. The investigative officer will consult with the complainant and with the person named in the complaint and others, if appropriate, in order to ascertain the facts and views of both parties.

2. If the evidence appears to support the complaint, the matter will ordinarily be referred to the Dean of the Faculty of Arts and Sciences. (When the complainant is an undergraduate, this assessment and referral is made by the Dean of Harvard College.)

The investigative officer or the panel (see 4 below) may at any point dismiss a complaint if it is found to be clearly without merit.

3. The investigative officer or a panel (see 4 below) will conduct an inquiry and prepare a report, in confidence, for submission to the Dean, summarizing the relevant evidence. A draft of the report will be circulated to the complainant, the respondent and the Dean in order to permit them the opportunity to respond before a final report is made.

The final report, presenting in summary the findings, will be sent to the complainant, the respondent, and the Dean.

Both the complainant and the respondent may at this time, and as expeditiously as possible, submit a statement to the Dean concerning the report.

4. When a complaint is brought against a Faculty member either the complainant, or the respondent, or the investigative officer may choose to refer the matter, at any point prior to a final disposition by the Dean of the Faculty, to a three-person panel. Although either the investigative officer or the panel may at any point dismiss a complaint if it is found to be clearly without merit, dismissal by a panel is final.

The panel will be drawn from the Faculty as follows:

The Dean of the Faculty will prepare a list of twelve voting members of the Faculty to serve as a hearing panel for the complaint. Complainant(s) and respondent(s) may each strike four names from the list; the three-person panel will then be appointed by the Dean from the remaining names on the list.

5. Upon consideration of the final report, the Dean may: (a) take whatever action he or she believes is warranted by the evidence; or (b) ask the investigative officer or panel to consider the matter further and submit a supplementary report. Final action by the Dean completes the procedure in the Faculty of Arts and Sciences.

6. The facts about individual cases and their dispositions are confidential. The Dean will, however, inform the complainant and respondent, in confidence, of the disposition of the case. An annual report will be prepared for the Faculty Council and the Faculty on the number and type of complaints, and in very general terms, on their disposition.

* * *

These procedures and their implementation will be reviewed by the Faculty Council three years after they are put into effect.

August 1984

[Editor's Note: As of the date of printing, this policy had not been revised.]

UNIVERSITY OF IOWA
POLICY ON SEXUAL HARASSMENT AND CONSENSUAL RELATIONSHIPS

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DIVISION 1. SEXUAL HARASSMENT

Section 1. RATIONALE.

(a) Sexual harassment is reprehensible and will not be tolerated by the University. It subverts the mission of the University, and threatens the careers, educational experience, and well-being of students, faculty, and staff. Relationships involving sexual harassment or discrimination have no place within the University. In both obvious and subtle ways, the very possibility of sexual harassment is destructive to individual students, faculty, staff, and the academic community as a whole. When through fear of reprisal a student, staff member, or faculty member submits, or is pressured to submit, to unwanted sexual attention, the University's ability to carry out its mission is undermined.

(b) Sexual harassment is especially serious when it threatens relationships between teacher and student or supervisor and subordinate. In such situations, sexual harassment exploits unfairly the power inherent in a faculty member's or supervisor's position. Through grades, wage increases, recommendations for graduate study, promotion, and the like, a teacher or supervisor can have a decisive influence on a student's, staff member's, or faculty member's career at the University and beyond.

(c) While sexual harassment most often takes place in situations of a power differential between the persons involved, the University also recognizes that sexual harassment may occur between persons of the same University status. The University will not tolerate behavior between or among members of the University community which creates an unacceptable working or educational environment.

Section 2. PROHIBITED ACTS.

No member of the University community shall engage in sexual harassment. For the purposes of this policy, sexual harassment is defined as unwelcome advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when:

(a) Submission to such conduct is made explicitly or implicitly a term or condition of an individual's employment or status in a course, program, or activity;

(b) Submission to or rejection of such conduct is used as a basis for an employment or educational decision affecting an individual; or

(c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work or educational performance, or of creating an intimidating, hostile, or offensive environment for work or learning.

Section 3. EXAMPLES OF SEXUAL HARASSMENT.

Sexual harassment encompasses any sexual attention that is unwanted. Examples of the verbal or physical conduct prohibited by Section 2 above include, but are not limited to:

(a) Physical assault;

(b) Direct or implied threats that submission to sexual advances will be a condition of employment, work status, promotion, grades, or letters of recommendation;

(c) Direct propositions of a sexual nature;

(d) Subtle pressure for sexual activity, an element of which may be conduct such as repeated and unwanted staring;

(e) A pattern of conduct (not legitimately related to the subject matter of a course if one is involved) intended to discomfort or humiliate, or both, that includes one or more of the following: (i) comments of a sexual nature; or (ii) sexually explicit statements, questions, jokes, or anecdotes;

(f) A pattern of conduct that would discomfort or humiliate, or both, a reasonable person at whom the conduct was directed that includes one or more of the following: (i) unnecessary touching, patting, hugging, or brushing against a person's body; (ii) remarks of a sexual nature about a person's clothing or body; or (iii) remarks about sexual activity or speculations about previous sexual experience.

Section 4. ISOLATED AND INADVERTENT OFFENSES.

(a) Members of the University community who, without establishing a pattern of doing so, engage in isolated conduct of the kind described in Subsections 3(e) and (f) or who exhibit a pattern of engaging in such conduct but fail to realize that their actions discomfort or humiliate demonstrate insensitivity that necessitates remedial measures. When University administrators become aware that such activities are occurring in their

areas, they should direct that those engaged in such conduct undertake an educational program designed to help them understand the harm they are doing.

(b) If, after participating in the educational program or failing to participate after being directed to do so, a person continues to engage in the conduct described in Subsection 4(a), he or she will be deemed to have engaged in a pattern of conduct intended to discomfort or humiliate the one at whom the actions or statements are directed.

DIVISION 2. CONSENSUAL RELATIONSHIPS

Section 5. DEFINITION.

As used in this Division, the terms "faculty" or "faculty member" mean all those who teach at the University, and include graduate students with teaching responsibilities and other instructional personnel.

Section 6. RATIONALE.

(a) The University's educational mission is promoted by professionalism in faculty-student relationships. Professionalism is fostered by an atmosphere of mutual trust and respect. Actions of faculty members and students that harm this atmosphere undermine professionalism and hinder fulfillment of the University's educational mission. Trust and respect are diminished when those in positions of authority abuse, or appear to abuse, their power. Those who abuse, or appear to abuse, their power in such a context violate their duty to the University community.

(b) Faculty members exercise power over students, whether in giving them praise or criticism, evaluating them, making recommendations for their further studies or their future employment, or conferring any other benefits on them. Amorous relationships between faculty members and students are wrong when the faculty member has professional responsibility for the student. Such situations greatly increase the chances that the faculty member will abuse his or her power and sexually exploit the student. Voluntary consent by the student in such a relationship is suspect, given the fundamentally asymmetric nature of the relationship. Moreover, other students and faculty may be affected by such unprofessional behavior because it places the faculty member in a position to favor or advance one student's interest at the expense of others and implicitly makes obtaining benefits contingent on amorous or sexual favors. Therefore, the University will view it as unethical if faculty members engage in amorous relations

with students enrolled in their classes or subject to their supervision, even when both parties appear to have consented to the relationship.

Section 7. CONSENSUAL RELATIONSHIPS IN THE INSTRUCTIONAL CONTEXT.

No faculty member shall have an amorous relationship (consensual or otherwise) with a student who is enrolled in a course being taught by the faculty member or whose academic work (including work as a teaching assistant) is being supervised by the faculty member.

Section 8. CONSENSUAL RELATIONSHIPS OUTSIDE THE INSTRUCTIONAL CONTEXT.

Amorous relationships between faculty members and students occurring outside the instructional context may lead to difficulties. Particularly when the faculty member and student are in the same academic unit or in units that are academically allied, relationships that the parties view as consensual may appear to others to be exploitative. Further, in such situations (and others that cannot be anticipated), the faculty member may face serious conflicts of interest and should be careful to distance himself or herself from any decisions that may reward or penalize the student involved. A faculty member who fails to withdraw from participation in activities or decisions that may reward or penalize a student with whom the faculty member has or has had an amorous relationship will be deemed to have violated his or her ethical obligation to the student, to other students, to colleagues, and to the University.

Section 9. FILING OF COMPLAINT

A complaint alleging violations of Division 2 may be filed by any person, or the process may be initiated by the Vice President for Academic Affairs.

DIVISION 3. PROCEDURES

Section 10. INFORMAL COMPLAINT.

(a) At the complainant's option, a complaint that one or more provisions of this policy have been violated may be brought to any appropriate member of the University community, including any academic or administrative officer of the University such as the Director of Affirmative Action, the Vice President for Student Services, the Associate Dean of the Faculties, the Associate Vice President for Finance and University Services, any collegiate dean, director, supervisor,

department head, ombudsperson, or advisor, and departments or organizations like the Women's Resource and Action Center and the Rape Victim Advocacy Program.

(b) The person to whom the complaint is brought will counsel the complainant as to the options available under this Policy and, at the complainant's request, (i) may help the complainant resolve the complaint informally and/or (ii) help the complainant draft a formal complaint if the complainant decides to follow that route.

(c) The person to whom the informal complaint is brought will not inform the accused of the complainant's action without the consent of the complainant.

Section 11. INVESTIGATION PRIOR TO FORMAL ACTION.

(a) A complainant wishing to make a formal complaint and have it pursued should file it with the Office of Affirmative Action, which will consult with the appropriate administrative officer to determine the method by which the investigation will be conducted.

(b) The purpose of the investigation is to establish whether there is a reasonable basis for believing that the alleged violation of this Policy has occurred. In conducting the investigation, the appropriate administrator may interview the complainant, the accused, and other persons believed to have pertinent factual knowledge. At all times, the administrator conducting the investigation will take steps to ensure confidentiality.

(c) The investigation will afford the accused a full opportunity to respond to the allegations.

(d) Possible outcomes of the investigation are (i) a judgment that the allegations are not warranted; (ii) a negotiated settlement of the complaint; or (iii) institution of formal action described in succeeding Sections of this Policy.

Section 12. PROCESS OF TAKING FORMAL ACTION.

(a) If after reviewing the report of the investigator the appropriate administrative official as described in Subsection (b) of this Section concludes that there is a reasonable basis for believing that the alleged violation of this Policy has occurred and a negotiated settlement cannot be reached, formal action will be taken.

(b) The decision to take formal action in cases in which:

(i) a faculty member, graduate assistant, or other instructional personnel has been charged will be made by the chief academic officer of the University, currently the Vice President for Academic Affairs, or that person's designee;

(ii) a staff member has been charged will be made by the Vice President responsible for the unit employing the person charged, or that person's designee;

(iii) a student has been charged will be made by the chief administrative officer of the University in charge of student affairs, currently the Vice President for Student Services, or that person's designee.

Section 13. FORMAL ACTION.

Except as specifically modified by other provisions of this Policy, formal action involving allegations of:

(a) Violations of this Policy by faculty members will be governed by the General Faculty Dispute Procedures (see Operations Manual Sec. 20.260) and the portion of the procedures dealing with faculty ethics (Sec. 20.266).

(i) Upon motion from one of the parties made before the start of the hearing process, the Hearing Panel shall close all or part of any hearing held under this Policy. Upon motion from one of the parties after the hearing has started or from some other interested party, the Hearing Panel may close all or part of a hearing held under this procedure.

(b) Violations of this Policy by staff members will be taken by the Vice President (or designee) responsible for the unit employing the accused staff member. Appeals from any formal disciplinary action against a Professional and Scientific staff member are governed by Section 20.311 of the University Operations Manual. Organized merit staff have access to a contractual grievance procedure, and non-organized merit staff have a procedure available under Regents Merit System rules;

(c) Violations of this Policy by graduate assistants will be governed by the procedure for dismissal of graduate assistants (Operations Manual Sec. 20.230);

(d) Violations of this Policy by students will be governed by Judicial Procedure for Alleged Violations of the Code of Student Life. (Both the Code of Student Life and the Judicial Procedure are published and distributed to students annually in "Policies and Regulations Affecting Students.")

Section 14. PROTECTION OF COMPLAINANT AND OTHERS.

(a) Investigations of complaints will be initiated only with the complainant's consent. The complainant will be informed fully of steps taken during the investigation.

(b) All reasonable action will be taken to assure that the complainant and those testifying on behalf of the complainant or supporting the complainant in other ways will suffer no retaliation as the result of their activities in regard to the process. Steps to avoid retaliation might include:

(i) Lateral transfers of one or more of the parties in an employment setting and a comparable move if a classroom setting is involved, and

(ii) Arrangements that academic and/or employment evaluations concerning the complainant or others be made by an appropriate individual other than the accused.

(c) In extraordinary circumstances, after consulting the Presiding Officer of the Faculty Judicial Commission, the Vice President for Academic Affairs may, at any time during or after an investigation of a sexual harassment complaint, suspend from teaching responsibilities any faculty member or teaching assistant accused of sexual harassment if, after reviewing the allegations and interviewing the accused, the complainant, and, if it seems appropriate, some others enrolled in the class, the Vice President finds that it is reasonably certain that (i) the alleged sexual harassment has occurred and (ii) serious and immediate harm will ensue if the person continues to teach the class.

Section 15. PROTECTION OF THE ACCUSED.

(a) At the time the investigation commences, the accused will be informed of the allegations, the identity of the complainant, and the facts surrounding the allegations.

(b) In the event the allegations are not substantiated, all reasonable steps will be taken to restore the

reputation of the accused if it was damaged by the proceeding.

(c) A complainant found to have been intentionally dishonest in making the allegations or to have made them maliciously is subject to University discipline.

Section 16. PROTECTING BOTH PARTIES.

(a) To the extent possible, the proceedings will be conducted in a way calculated to protect the confidentiality interests of both parties.

(b) After the investigation, the parties will be informed of the facts developed in the course of the investigation.

(c) The parties will be informed promptly about the outcome of the proceedings.

DIVISION 4. EDUCATIONAL PROGRAMS

Section 17. EDUCATION AS A KEY ELEMENT OF UNIVERSITY POLICY.

Educational efforts are essential to the establishment of a campus milieu that is as free as possible of sexual harassment (Division 1) and in which high standards of conduct in consensual relationships (Division 2) are observed. There are at least four goals to be achieved through education: (1) ensuring that all victims (and potential victims) are aware of their rights; (2) notifying individuals of conduct that is proscribed; (3) informing administrators about the proper way to address complaints of violations of this Policy; and (4) helping educate the insensitive about the problems this Policy addresses.

Section 18. PREPARATION AND DISSEMINATION OF INFORMATION.

(a) The Office of Affirmative Action is charged with distributing copies of this Policy to all current members of the University community and to all those who join the community in the future. An annual letter from the Office of Affirmative Action will be sent to all faculty and staff to remind them of the contents of the University's Human Rights Policy, including the provisions added to it by this Policy. A copy of the Human Rights Policy will be included in student orientation materials, including those distributed to students in professional schools. In addition, copies of that Policy will be made continually available at appropriate campus centers and offices.

(b) The Office of Affirmative Action will develop a series of training sessions for persons who are likely to receive complaints that this Policy has been violated, including, but not being limited to, such persons as residence hall resident advisors, academic advisors, supervisors, and University and collegiate ombudspersons. Academic departments are encouraged to provide training sessions for graduate assistants and other instructional personnel.

(c) The Office of Affirmative Action will develop a course designed to inform those who inadvertently violate this Policy (Section 4) of the problems they create by their insensitive conduct. The course shall be mandated for those in violation of Section 4 and may be an element in the settlement of a complaint. It also may be mandated for persons found to have violated this Policy.

University of North Carolina at Charlotte

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SEXUAL HARASSMENT

I. Statement of Policy

The University of North Carolina at Charlotte affirms its commitment to ensuring an environment for all employees and students which is fair, humane, and respectful -- an environment which supports and rewards employee and student performance on the basis of relevant considerations such as ability and effort. Behaviors which inappropriately assert sexuality as relevant to employee or student performance are damaging to this environment. Sexual harassment by any member of the University is a violation of both law and University policy, and will not be tolerated in the University community. Sexual harassment is a particularly sensitive issue which may affect any member of the University community and as such will be dealt with promptly and confidentially by the University administration.

II. Definitions of Sexual Harassment

A. Employees

EEOC guidelines define sexual harassment as follows:

Harassment on the basis of sex is a violation of Section 703 of Title VII, which states that: "Unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature constitute sexual harassment when--

1. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment.
2. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
3. such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."

B. Students

Sexual harassment of students is a violation of Title IX of the Education Amendments of 1972, which prohibits sex discrimination in education. Academic sexual harassment is the use of authority to emphasize the sexuality of a student in a manner which prevents or impairs that student's full enjoyment of educational benefits, climate, or opportunities. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when grades or educational progress are made contingent upon submission to such conduct, or when the conduct has the purpose or effect of interfering with the individual's academic performance, or of creating an intimidating, hostile, or offensive educational environment.

III. Responsibilities and Appointments

A. General

While it is the responsibility of all employees and students in the University to conduct themselves in such a way as to contribute to an environment free of sexual harassment, the responsibility falls especially upon University administrators and supervisors. Should an administrator or supervisor have knowledge of conduct involving sexual harassment or receive a complaint of sexual harassment that involves a University employee or agent under his or her administrative jurisdiction, immediate steps must be taken to deal with the matter appropriately, whether or not invoked by a grievance procedure. Taking positive steps to sensitize employees and students with respect to this issue is also a responsibility of University administration.

B. Responsible Institutional Officer

The University Affirmative Action Officer shall have overall responsibility for implementation of policies and procedures dealing with sexual harassment.

C. Advisory Committee on the Prevention of Sexual Harassment

The Chancellor shall appoint by written notice a committee of six to eight members to advise and assist the University Affirmative Action Officer in maintaining a University environment that is free of sexual harassment. The committee shall include not less than two faculty members, two staff employees, and two students with the Chairperson to be elected by the members at the first sitting of the committee. Committee members shall, except where necessary to initially establish the rotation herein prescribed, serve two year terms with approximately one-half of the terms expiring annually.

D. Sexual Harassment Training Coordinator

The Chancellor shall appoint by written notice a training coordinator to work with the University Affirmative Action Officer in designing and carrying out a comprehensive program of training and education on the subject of preventing sexual harassment. Term of appointment shall be two years. The program shall include awareness training for administrators, faculty, staff members, and students. Student programs will be coordinated through the Office of the Vice Chancellor for Student Affairs; faculty programs through the Office of the Vice Chancellor for Academic Affairs; and all other programs through the Personnel Department.

E. University Mediation Panel

The Chancellor shall appoint by written notice a panel of three to five members to serve as counselors and third party mediators to members of the University community. Term of appointment shall be two years.

IV. Procedures

Because of the sensitive nature of situations involving sexual harassment and other forms of discriminatory personal behavior, and to assure speedy and confidential resolution of these issues, the University has established informal mediation procedures and formal grievance procedures for handling complaints involving sexual harassment. Informal procedures may be utilized, but are not required to precede the formal procedures.

If a complaint is directed against an individual who would otherwise play a role in responding to and attempting to resolve the complaint, the function assigned to that person by these procedures will be assigned to another person designated by the appropriate Vice Chancellor or the Chancellor.

A. Informal Procedures

University Mediation Panel

The function of University Mediators shall be to attempt to resolve informally complaints of sexual harassment and other forms of discriminatory personal behavior brought to them by members of the University community. Any student, staff or faculty member may select a mediator of their choice from the Panel. Informal proceedings may also be initiated by an administrative official of the University. Each mediator will function individually to mediate complaints, but all mediators will follow consistent procedures. Training of Mediators shall be the responsibility of the University Affirmative Action Officer.

Mediators shall:

1. Listen to the complaint, and assist the complainant in clarifying his/her experiences and feelings.
2. Advise complainant on his/her options, both informal and formal.
3. Inform the University Affirmative Action Officer before any inquiry is begun.
4. At the request of the complainant, talk to the accused harasser without revealing the identity of the complainant, in an attempt to work out a satisfactory solution, and convey to the complainant the results of that discussion.
5. If both parties are satisfied with the outcome of the mediation process, the matter ends there.
6. If the accused harasser is not willing to participate in the mediation process, the mediator will inform him/her of the formal procedures, and will explain the options available to him/her.
7. If the complainant is not satisfied with the outcome, he/she may take the matter through the appropriate formal grievance procedures.

B. Formal Procedures

Formal procedures may be initiated by the aggrieved person or by an administrative official of the University subsequent to the failure of informal mediation. A formal grievance relating to a complaint of sexual harassment or other forms of discriminatory personal behavior may be initiated by any employee or student either in lieu of informal mediation or where efforts at informal mediation have failed.

1. Employees

A University employee who wishes to proceed with a formal grievance shall use the standard grievance procedures appropriate to the employee's status as faculty, EPA Non-faculty, or SPA employee.

a. SPA Employees

If the informal procedures described in Section IV.A. have been attempted but resolution satisfactory to the employee has not been reached, the employee may submit a signed written statement to an ad hoc Grievance and Appeal Committee through the Director of Personnel (Step 3 of the "UNCC Grievance and Appeal Procedures for SPA Employees").

If the informal procedures described in Section IV.A. have not been attempted, the employee must attempt to resolve grievance beginning with Step 1 and may proceed to Step 2 if necessary, but may delete Step 1 and Step 2 if the immediate supervisor or department head is a person accused of sexual harassment.

b. EPA Non-Faculty Employees

An EPA Non-faculty employee may file a grievance with the EPA Non-faculty Grievance Committee as described in Section IV.D. of the "Personnel Policies for Designated Employment Exempt from the State Personnel Act" (UNCC Policy Statement #64). That policy shall be interpreted so as not to require a prior effort to resolve the matter with the "administrative official most directly concerned" if that official is a person accused of sexual harassment.

C. Faculty Employees

A faculty employee may file a grievance with the University Grievance Committee, as described in section 9.B.6. of the Tenure Policies, Regulations, and Procedures of The University of North Carolina at Charlotte, except that when a faculty member alleges sexual harassment as evidence of a charge that a decision not to reappoint him or her to the faculty was based upon one or more of the existing impermissible grounds, that complaint shall be to the University

Hearing Committee in accord with section 5.D. of the Tenure Policies, Regulations, and Procedures of The University of North Carolina at Charlotte.

2. Students

A student who wishes to proceed with a formal grievance shall use the procedures outlined in the Student Grievance Procedures or the Code of Student Responsibilities, as appropriate.

V. Sanctions

Remedial actions will depend on the severity of the incident. Because of the private nature of sexual harassment incidents, and the emotional and moral complexities surrounding such issues, every effort shall be made to resolve problems on an informal basis, if possible. When a mediator can resolve a complaint informally, no formal record of the incident will be considered to be part of the personnel file of the person accused. A confidential record of the mediation efforts will be kept on file in the University Affirmative Action Office. If the complaint goes to formal grievance procedures and a decision is reached to invoke remedial actions, the following sanctions may be applied in accordance with applicable disciplinary procedures depending on the severity of the case.

A. A letter of reprimand will be written and placed in the wrongdoer's personnel file, with a terminal life of two years; action will be taken to provide appropriate relief to the aggrieved party.

B. A letter of reprimand for the person's file and suspension without pay or leave of absence for a period of time (to be determined); appropriate relief for the aggrieved party.

C. Termination of employment for the wrongdoer; aggrieved party to be reinstated, restored, given appropriate relief, etc.

VI. Retaliation Prohibited

This policy seeks to encourage students, staff, and faculty to express freely, responsibly, and in an orderly way their opinions and feelings about any problem or complaint of sexual harassment. Any act by a University employee or agent of reprisal, interference, restraint, penalty, discrimination, coercion or harassment--overtly or covertly--against a student or an employee for responsibly using the Policy and its Procedures interferes with free expression and openness. Accordingly, such acts violate this policy and require appropriate and prompt disciplinary action.

VII. Frivolous or False Charges

This policy shall not be used to bring frivolous or malicious charges against fellow students, faculty members, or employees. Disciplinary action under the appropriate personnel policies concerning personnel misconduct shall be taken against any person bringing a charge of sexual harassment in bad faith.

(Submitted by the Vice Chancellor for Business Affairs and approved by the Executive Staff on June 9, 1980; revisions by the Director of Personnel approved by the Executive Staff on November 4, 1985.)

AMERICAN COUNCIL ON EDUCATION

STATEMENT

DECEMBER 1986

SEXUAL HARASSMENT ON CAMPUS: SUGGESTIONS FOR REVIEWING CAMPUS POLICY AND EDUCATIONAL PROGRAMS

INTRODUCTION

This statement is designed to provide guidance to colleges and universities in reviewing or establishing policies, procedures, and programs on sexual harassment.

The recent Supreme Court decision on Meritor Savings Bank, FSB v. Vinson is reviewed and general guidelines for establishing effective campus programs on sexual harassment are presented.

THE MERITOR SAVINGS BANK, FSB V. VINSON, DECISION

In Meritor Savings Bank, FSB v. Vinson, (June 1986) the Supreme Court unanimously ruled that sexual harassment in the workplace which causes a hostile or offensive job environment is actionable under Title VII of the Civil Rights Act of 1964, even if it does not result in job or promotion loss.

The Court declared that an employee need not suffer any tangible economic loss to bring such a claim. The ruling enunciates the conditions under which sexual harassment may violate federal civil rights laws, and serves as an important reminder of the need to establish policies that clearly prohibit sexual harassment. Further, the ruling suggests procedures for limiting an employers liability for sexual harassment claims.

The decision in Vinson concluded that a hostile work environment, created by the unwelcome sexual advances of a supervisor, amounts to illegal employment discrimination. The case also makes clear that whether or not sex-related conduct is "voluntary" in the sense that an individual is not forced against his or her will to participate, it will not serve as a defense to a sexual harassment suit brought under Title VII where the conduct is unwelcome. However, the Court declined to issue definitive guidelines regarding the scope of employer liability. The Court further stated that employers could not use ignorance of the harassment experience as a complete shield from liability. The existence of a general or a harassment-specific grievance policy also would not necessarily provide an adequate shield.

Although the Vinson decision applies specifically to employment, it is prudent to examine the case and its implications for the campus setting. This provides an opportunity to renew institutional commitment to eliminating sexual harassment, or to develop an institution-wide program to address the problem.

THE IMPORTANCE OF DEVELOPING A CAMPUS PROGRAM ON SEXUAL HARASSMENT

The educational mission of a college or university is to foster an open learning and working environment. The ethical obligation to provide an environment that is free from sexual harassment and from the fear that it may occur is implicit. The entire collegiate community suffers when sexual harassment is allowed to pervade the academic atmosphere through neglect, the lack of a policy prohibiting it, or the lack of educational programs designed to clarify appropriate professional behavior on campus and to promote understanding of what constitutes sexual harassment. Each institution has the obligation, for moral as well as legal reasons, to develop policies, procedures, and programs that protect students and employees from sexual harassment and to establish an environment in which such unacceptable behavior will not be tolerated.

Taking preventative steps can help shield the institution from potential liability as well as address legitimate constituent concerns.

KEY COMPONENTS OF EFFECTIVE CAMPUS PROGRAMS

An effective campus program on sexual harassment has several key elements affecting both policy and procedure. These elements can also be found in successful business and government programs. They are:

1. A basic definition: What constitutes sexual harassment?

2. A strong policy statement: Sexual harassment will not be tolerated.

3. Effective communication: Channels exist for informing students, faculty, staff, and administrators about the campus policy against sexual harassment.

4. Education: Educational programs are designed to help all members of the community recognize and discourage sexual harassment.

5. An accessible grievance procedure: Alternative methods of initiating complaints and a procedure to insure the rights of all parties are protected as much as possible should be provided. Complaints are investigated and resolved promptly.

Common Elements of Sexual Harassment

The task of developing a basic statement of what constitutes sexual harassment is an important part of the educative process for the campus. This paper does not attempt to give a model definition suitable to all campuses, but instead presents some of the elements to consider in developing a basic statement.

Sexual harassment is a form of sex discrimination which is illegal under Title VII of the Civil Rights Act of 1964 for employees and under Title IX of the Elementary/Secondary Education Act of 1972 for students. Some states laws and/or regulations also render it illegal.

Sexual harassment can be verbal, visual, or physical. It can be overt, as in the suggestion that a person could get an "A" if a particular sexual favor is granted. Or, it can consist of persistent, unwanted attempts to change a professional relationship to a personal one. Sexual harassment can

range from inappropriate put-downs of individual persons, unwelcome sexual flirtations, or classes of people to serious physical abuses such as rape. It is coersive and threatening; it creates an atmosphere that is not conducive to teaching, learning, and working.

The University of Wisconsin has taken these elements and turned them into a working policy statement, which here serves as an example. This policy definition is contained in a document that includes additional descriptions of what constitutes sexual harassment and how the policy will be implemented.

For general policy purposes, sexual harassment may be described as unwelcome sexual advances, requests for sexual favors, and other physical and expressive behavior of a sexual nature where: (1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or education; (2) Submission to or rejection of such conduct by an individual is used as the basis for academic or employment decisions affecting the individual; or (3) Such conduct has the purpose or effect of substantially interfering with an individual's academic or professional performance or creating an intimidating, hostile or demeaning employment or educational environment.
... University of Wisconsin, May 7, 1981

Grievance Procedures

If a general grievance procedure is not already in place, a complaint and reporting system should be created. It should allow students and employees to report harassment free from threats of reprisals and should adequately protect the anonymity of all parties involved. The design of the grievance procedure should include a provision that allows the complaining party to avoid her or his immediate supervisor or department head, who frequently, as in Vinson, may be the source of the problem.

In some situations it may be impossible to determine whether the sexually harassing conduct did or did not occur. Therefore, substantial sensitivity and confidentiality should be accorded an investigation.

GUIDELINES FOR DEVELOPING A CAMPUS PROGRAM ON SEXUAL HARASSMENT

The following guidelines may be helpful in improving a current sexual harassment policy/program, or designing a new one:

1. Develop a strong policy prohibiting sexual harass ment. A formal policy should be in place that defines sexual harassment and includes a statement as to why it is important for your institution to prevent sexual harassment. The policy may be more effective if it is endorsed by the faculty governing body and monitored by a committee of that body.

2. Develop a grievance procedure that encourages the reporting of incidents of sexual harassment, that allows first for informal resolution and then, if the process fails, for formal resolution.

3. Disseminate the policy to all faculty, staff, administrators, and students as well as to those who contract to do business on campus including those agencies, businesses, education groups, etc. that provide students with internships. The policy and supporting materials could be included in the student handbook; course catalog; course timetable; employee handbook; administrative, faculty, and staff handbooks; pamphlets; institutional campus contracts; and could be incorporated into the academic governance code.

4. Develop a method for informing new staff, faculty, students, and administrators about the policy and for including them in all education programs. Orientation programs and other in-house workshops and seminars may serve as appropriate forums.

5. Create and keep current a campus-wide educational program designed to help all members of the campus community to understand, prevent, and combat sexual harrassment. Brochures describing what kinds of behavior constitute sexual harassment and what the person who is being harassed should do about it have been used very successfully on a number of campuses. (See campus resource listing below.)

6. Provide additional training to supervisory personnel, especially deans, department heads, and administrative and student affairs staff, through work shops and seminars. Student and collegiate governance structures may be appropriate outlets for ongoing training and discussion.

7. Appoint a coordinator to handle reports of harassment. The ombudsperson, affirmative action officer, a student affairs staff member, or a combination of people in these positions, could serve in such capacity. This person or persons should be known to students, faculty, staff, and administrators, and be highly respected by the entire campus community.

8. Adopt, publicize, and enforce penalties for violations of the policy.

9. Investigate and resolve complaints promptly.

10. Keep written records, but take precautions to protect the privacy of all parties involved.

11. Take action to resolve claims even if a discrimination charge has been filed with EEOC or a state EEO agency.

12. Publish the results of resolved complaints on a periodic basis, making certain that all information to be used protects the privacy of parties involved.

Sexual Harassment

Suggested Policy and Procedures for Handling Complaints*

The report which follows was approved by Committee W on the Status of Women in the Academic Profession and adopted by the Council in June 1984 as Association policy.

The American Association of University Professors has traditionally opposed every kind of practice that interferes with academic freedom. In recognition of the profession's own responsibility to protect that freedom, moreover, the Association has frequently spoken to the need for colleges and universities to provide appropriate ethical standards and to provide suitable internal procedures to secure their observance.

Recently, national attention has focused on complaints of sexual harassment in higher education. These particular complaints invoke the Association's more general commitment to the maintenance of ethical standards and the academic freedom concerns these standards reflect. In its 1966 *Statement on Professional Ethics*, the Association reiterated the ethical responsibility of faculty members to avoid "any exploitation of students for . . . private advantage." The applicability of this general norm to a faculty member's use of institutional position to seek unwanted sexual relations with students (or anyone else vulnerable to the faculty member's authority) is clear.

Similarly, the Association's 1970 *Statement on Freedom and Responsibility* restated that "intimidation and harassment" are inconsistent with the maintenance of academic freedom on campus. The *Statement* is no less germane because one is being made unwelcome because of sex, rather than unwelcome because of race, religion, politics, or professional interests. The unprofessional treatment of students and colleagues assuredly extends to sexual discrimination and sexual harassment, as well as to other forms of intimidation.

In our view, it is incumbent upon a university or college to make plain the general policy we have just described, with an established procedure for its implementation. The institution should also make clear that sexual harassment and attempted sexual duress are included under the head of unprofessional conduct threatening to the academic freedom of others.

Federal guidelines have treated sexual harassment as a problem calling for distinct treatment,[1] and not all institutions find it sufficient to treat it under existing policy and procedures. Recently, some have developed definitions of exceptional detail (e.g., the University of Wisconsin). Others have adopted the EEOC definition (e.g., Northeastern University). Still others have adopted some modification of the EEOC version (e.g., Wellesley College). Whatever approach is adopted,

[1]In November 1980, the Equal Employment Opportunity Commission (EEOC) issued a set of *Guidelines on Discrimination Because of Sex*, which includes a section that deals with sexual harassment. The EEOC concluded that "harassment [of employees] on the basis of sex is a violation of Section 703 of Title VII of the Civil Rights Act of 1964." The courts have upheld the EEOC position, and have extended the coverage of Title IX of the Education Amendments of 1972 to prohibit employment discrimination in federally assisted programs (*North Haven Board of Education* v. *Bell*, 102 S. Ct. 1912 [1981]). The EEOC *Guidelines* suggest that employers are obliged to have such policies and to be certain that employees are aware of them. Naturally, any individual involved in a sexual harassment incident reserves the right to pursue the matter in the courts or before governmental agencies. These avenues, which are potentially lengthy and costly, may be avoided through appropriate and effective internal guidelines, procedures, and remedies.

*AAUP Policy Documents & Reports, 1984 Edition.

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it should be made clear that the institution does not condone abuses by faculty members of the academic freedom of others, whether in respect to sexual harassment or otherwise, and that genuine internal recourse is available against such misconduct. As advice to colleges and universities desiring a separate statement of policy on sexual harassment, the Association proposes the following:

I. STATEMENT OF POLICY

It is the policy of this institution that no member of the academic community may sexually harass another. Sexual advances, requests for sexual favors, and other conduct of a sexual nature constitute sexual harassment when:

1. Any such proposals are made under circumstances implying that one's response might affect such academic or personnel decisions as are subject to the influence of the person making such proposals; or
2. Such conduct is abusive of others and implies, in an abusive manner, a discriminatory hostility toward their personal or professional interests because of their sex.[2]

II. APPLICABLE PROCEDURES

Bringing a Complaint:

1. Any member of the college or university community who believes that he or she has been the victim of sexual harassment as defined above (the complainant) may bring the matter to the attention of the individual(s) designated to handle complaints of discrimination (such as the grievance officer or another officer on campus sensitive to the issues involved).[3]
2. The complainant should present the complaint as promptly as possible after the alleged harassment occurs. One consequence of the failure to present a complaint promptly is that it may preclude recourse to legal procedures should the complainant decide to pursue them at a later date.
3. The initial discussion between the complainant and the grievance officer should be kept confidential, with no written record.
4. If the complainant, after an initial meeting with the grievance officer, decides to proceed, the complainant should submit a written statement to the grievance officer. Cases involving sexual harassment are particularly sensitive and demand special attention to issues of confidentiality. Dissemination of information relating to the case should be limited, in order that the privacy of all individuals involved is safeguarded as fully as possible.
5. The grievance officer should inform the alleged offender of the allegation and of the identity of the complainant. A written statement of the complaint should be given to both parties. Every effort should be made to protect the complainant from retaliatory action by those named in the complaint.

[2]The law is unsettled as to the extent of an employer's responsibility for sexual harassment perpetrated by its employees. *Alexander* v. *Yale University*, 631 F.2d 178 (2nd Cir. 1980); *Barnes* v. *Costle*, 561 F.2d 993 (D.C. Cir. 1977). As a general principle, the employer should be responsible for all conduct within subparagraph 1 of the above definition. It should be responsible for conduct falling entirely within subparagraph 2 if appropriate officials of the institution are aware, or should reasonably be aware, of the conduct and fail to take remedial action. Appropriate officials would include the grievance officer or any supervisor of the alleged offender.

[3]The grievance officer at his or her discretion should counsel the complainant about other avenues for pursuing the complaint, such as state or local government human rights agencies and the federal EEOC. Deadlines for filing complaints with these agencies, such as the 180-day requirement for filing employment discrimination claims with the EEOC, should be explained. The grievance officer might also suggest that the complainant seek legal counsel.

Resolution of a Complaint

1. Promptly after a complaint is submitted, the grievance officer should initiate whatever steps he or she deems appropriate to effect an informal resolution of the complaint acceptable to both parties.

2. The complainant, if unsatisfied with the resolution proposed by the grievance officer, should have access to the grievance procedures at the institution upon prompt submission of a written request to the grievance officer.

3. *Review by a faculty committee of a complaint against a faculty member.*[4] Members of the faculty review committee should meet to discuss the complaint. Unless the committee concludes that the complaint is without merit, the parties to the dispute should be invited to appear before the committee and to confront any adverse witnesses. The committee may conduct its own informal inquiry, call witnesses, and gather whatever information it deems necessary to assist it in reaching a determination as to the merits of the allegations. Once such a determination has been reached, it should be communicated in writing to both parties and to the grievance officer. A summary of the basis for the determination should be provided to either party upon request.

4. *Corrective action and/or disciplinary measures.* If the review committee's findings do not lead to a mutually acceptable resolution, and if the committee believes that reasonable cause exists for seeking sanctions against a faculty offender, the grievance officer should forward the recommendation immediately to the chief administrative officer or his or her designate. The chief administrative officer shall then proceed in the manner set forth in Regulation 7 of the Association's *Recommended Institutional Regulations on Academic Freedom and Tenure*[5] except that the need for a preliminary review will be precluded.

Well-publicized procedures such as these will help to create an atmosphere in which individuals who believe that they are the victims of harassment are assured that their complaints will be dealt with fairly and effectively. It is more important still to create an atmosphere in which instances of sexual harassment are discouraged. Toward this end, all members of the academic community should support the principle that sexual harassment represents a failure in ethical behavior and that sexual exploitation of professional relationships will not be condoned.

[4]The Association seeks through these guidelines to urge the adoption by colleges and universities of adequate due process provisions for all members of the academic community—students, faculty, and staff—where there has been an allegation of sexual harassment. It has developed specific review procedures to handle complaints involving faculty members.

[5]*Regulation 7* reads as follows: "Procedures for Imposition of Sanctions Other than Dismissal. (a) If the administration believes that the conduct of a faculty member, although not constituting adequate cause for dismissal, is sufficiently grave to justify imposition of a severe sanction, such as suspension from service for a stated period, the administration may institute a proceeding to impose such a severe sanction; the procedures outlined in Regulation 5 [dismissal procedures] will govern such a proceeding. (b) If the administration believes that the conduct of a faculty member justifies imposition of a minor sanction, such as a reprimand, it will notify the faculty member of the basis of the proposed sanction and provide the faculty member with an opportunity to persuade the administration that the proposed sanction should not be imposed. A faculty member who believes that a major sanction has been incorrectly imposed under this paragraph, or that a minor sanction has been unjustly imposed, may, pursuant to Regulation 15, petition the faculty grievance committee for such action as may be appropriate."

III. POLICY DEVELOPMENT

TO DRAFT A MORE PERFECT POLICY: The Development of the University of Iowa's Sexual Harassment Policy

Mary Jo Small, Associate VP for Finance and University Services
Julia Mears, Assistant to the President

In the summer of 1986 the University of Iowa promulgated a new and greatly expanded policy on sexual harassment and consensual relationships. The final version of the policy came after almost two years of work by a University-wide Task Force, consultation with all major constituent groups, consideration of individual comments on the Task Force draft from a number of faculty and staff members, and a thorough review of the draft by the president, who was assisted by a senior member of the faculty of the college of law.[1]

In order to provide the University community with a clear statement of the proper standard of conduct for its members and in response to a few unemployment compensation cases involving other Iowa employers which held that sexual harassment created intolerable working conditions, in 1978, the University of Iowa amended its human rights policy specifically to prohibit sexual harassment. These amendments were adopted prior to the promulgation of EEOC guidelines on sexual harassment and before most college and universities had formally addressed the issue. The University of Iowa policy statement was brief and general:

> (a) Under the Regents Rules of Personal Conduct, and the University of Iowa's Human Rights Policy, faculty, staff and students have a right to be free from sexual harassment by colleagues, supervisors or teachers. The University will not condone actions and words which a reasonable person would regard as sexually harassing or coercive.

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[1]The final version of the policy did not command universal support with regard to its prohibition of consensual relationships between teachers and those for whom they have responsibility.

When the amended policy was first made public it was subject to two types of criticism. The first came primarily from male faculty members who feared false charges would be filed or who wanted to know how they were to be protected from the advances of their students. The second criticism was raised by those who wished to facilitate the filing of complaints, and who were concerned that the statement did not make clear enough what would happen when a complaint was filed.

In response to the second criticism, a brief statement of procedures was developed in consultation with the Council on the Status of Women. These procedures provided that:

> (b) Individuals who feel that they have been the objects of such harassment should advise their supervisory dean or the University of Iowa's Affirmative Action Officer. In investigating such complaints, the following principles will be observed:
>
> (1) That the person bringing the complaint would suffer no retaliation.
>
> (2) That the complaint would not be discussed with anyone else without the complainant's permission.
>
> (3) That if permission was given to pursue and investigate the complaint, that such an investigation would be conducted by the head of the major administrative unit in which the complaint was brought or a designee of that administrator.
>
> (4) That in conducting such an investigation, the right to confidentiality, both of the complainant and of the accused, would be respected.
>
> (5) That the investigation would be conducted as quickly as possible and the results reported to the complainant.
>
> (6) That in the event the complaint is found to be valid, that the person that has been guilty of sexual harassment will receive appropriate counseling or disciplinary action, as would be the case in other instances of violation of University policy.

As years passed under the policy described above, several issues arose which made it increasingly clear that the University should undertake a complete revision and expansion of its policy. Questions were raised by faculty representatives about the adequacy of protection for the accused, and a few instances of overzealous enforcement by individual departments were brought to the attention of the University. In one case, a graduate student first learned of allegations against him concerning use of inappropriate language when he was informed that he had been found guilty and that one further incident would result in his dismissal from the department.

From others in the community the University heard concerns relating to the lack of detail and specificity in the policy. The apprehension shared by many was that because the policy was so general it neither communicated adequately a proper standard of behavior nor did it assist possible victims in determining their rights under it.

Members of the University administration who had worked on the investigation and resolution of sexual harassment complaints under the 1978 policy also concluded that it was time for a review of the policy. They wished to incorporate into the formal policy the "common law" of the University on this issue which had evolved over a number of years. They also thought it would be useful to codify the investigative practices which had developed. They were, moreover, acutely aware that the law in the area of sexual harassment had developed dramatically in the years since 1978, and that institutions with more recent policies had been guided by such developments.

Finally, and crucial to the degree of attention paid in the new policy to consensual relationships between teachers and students, was a request made by the Council on Teaching.[2] In a letter in the spring of 1984 to Vice

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[2]The Council is part of a network of University-wide committees involved in the governance of the University. Its membership includes faculty, students, and staff members, and it advises the Vice Presidents for Academic Affairs and Student Services.

President for Academic Affairs Richard D. Remington, the Council asked that he deal with an issue which they felt to be increasingly troubling: inappropriate personal relationships between teachers and students.[3]

The Sexual Harassment Task Force was appointed in the summer of 1984 by President James O. Freedman, upon the recommendation of those in the University administration who were most often called upon to deal with sexual harassment complaints.[4] In constituting the Task Force, every effort was made to bring together people who represented a variety of viewpoints and constituent interests. The chair of the Task Force was a faculty member in the Department of Obstetrics and Gynecology in the College of Medicine, who had previously been chair of the board of the Women's Resource and Action Center as well as a member of a recent search committee for the Director of Affirmative Action. Other faculty members included a former chair of the Faculty Welfare Committee, a professor of business law who had been involved in drafting the original sexual harassment policy as a member of the Council on the Status of Women, and a professor of law who had acted,

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[3]In response to the Council's request, Vice President Remington sent a letter to all faculty members in the fall of 1984 reminding them that their relationships with students for whom they were responsible were to be professional and not personal in nature. At the same time he referred the question of consensual relationships to the newly formed Sexual Harassment Task Force and asked that the Task Force recommend a more fully developed statement for the guidance of the University Community. Interestingly enough this issue was to prove the least controversial within the Task Force but the most controversial for the University community as a whole.

[4]Those University administrators included Mary Jo Small, Associate Vice President for Finance and University Services; Fredrick Woodard, Associate Dean of Faculties; Julia Mears, Assistant to the President; and Laura Douglas, then Director of Affirmative Action.

at the University's request, to insure that a faculty member accused of sexual harassment received all the procedural safeguards which were due. Staff members appointed to the Task Force included an Assistant to the Director of University Hospitals who was both a nurse and an attorney and who served as the Task Force's secretary, a secretary in the College of Business Administration, an Assistant to the Dean in the College of Medicine who had investigated sexual harassment cases in the course of his duties, and an Assistant to the Director of Residence Services who was a current member of the Council on the Status of Women.

The Task Force also included several students. One was a graduate student in Women's Studies and Labor History, and two were undergraduate women who were members of the Council on the Status of Women. The four University officials named earlier served as ex officio members of the Task Force, as did the Coordinator of the Women's Resource and Action Center and the Coordinator of the Rape Victim Advocacy Program. Of the voting members of the Task Force, eight were women and three were men. Two were members of minority groups. Of the ex-officio members of the Task Force, five were women and one was a man; two were members of minority groups.

The Task Force began its work by collecting copies of policies at other institutions and identifying the major topics to be addressed. After review of the policies collected, the Task Force divided its work into (1) the drafting of a definition of sexual harassment and a policy statement regarding the University's view of its consequences; (2) the development of procedures for investigations and sanctioning; and (3) preparation of a statement on consensual relationships.

The Task Force as a whole spent the most time in drafting a policy statement on and a definition of sexual harassment. It began this part of its work by reviewing the policies it had collected from other schools; the University of Minnesota's policy was chosen as the best model for Iowa's purposes. Although the structure and wording of the Task Force's final draft departed significantly from the Minnesota statement, it was in great part inspired by it.

Even with the Minnesota statement as a guide, the Task Force labored

mightily before it was satisfied with its own product. One source of difficulty was the usual problem which committees face in producing a common statement. It is hard for a group to produce a rhetorically compelling policy and the University's experience was no exception. Various Task Force members edited each other's work again and again until the group was ready to approve a final draft.

More substantive issues arose in defining the scope of the policy. The first question the committee faced was whether it wished the new policy to cover what might be termed sexist behavior or whether the new policy should be confined to condemning behavior which had a specifically sexual content. After some discussion it was decided that to define sexual harassment too broadly would dilute the effect of the policy. The Task Force also concluded that other University policies provided sufficient coverage of sexist, as opposed to sexually related, behavior.

The next issue the group faced was the degree of specificity to provide in illustrating behavior which was prohibited by the policy. On the one hand, the Task Force feared that if a specific list was provided, it would be inferred that any other behavior was permitted. On the other hand, if no examples were given, the new policy would provide no better guidance than the one it was intended to replace. The final judgment of the Task Force was to provide a relatively specific list of behavior which fell within the term "sexual harassment" and to make clear that the list was intended to be illustrative rather than inclusive.

In creating this list of behaviors, the area of language and specifically the question of inappropriate use of humor caused particular problems. The ex officio Task Force members were particularly interested in having a reference to jokes and other inappropriate use of humor included in the policy. This interest arose from their experiences with accused faculty members and supervisors who had claimed that sexual propositions or otherwise harassing behavior was only a form of "joking." In these instances the accused asserted, in effect, that because they didn't intend the offensive language to have been construed as it had been, they had not engaged in harassment. Those charged with enforcing the policy were convinced of the need to remove this defense from the arsenal of harassers. Some members of

the Task Force were also aware of and concerned about the impact of the Kyriaki case in which the court found that sexually explicit humor was used to create an intolerable working environment for a female engineer employed by the Western Electric Company.[5]

A second area of particular difficulty under the general category of inappropriate language had to do with references to sexually-related status, such as virginity, or references to appearance which were sexually explicit. In both cases the Task Force attempted to define narrowly, but clearly, the type of statements which would be considered to be sexually harassing.

As the policy statement and definition were refined, the Task Force began consideration of the procedures which would be used in enforcing the new policy. Here, too, the Task Force began with a review of the procedures used at other institutions. As a result of this review, a number of issues were raised: (1) Should there be an opportunity for informal resolution of a complaint in addition to a mechanism for the investigation and disposition of formal complaints?; (2) Who should investigate formal complaints -- a panel, the Affirmative Action Office, or the department or college in which the faculty or staff member or student worked or studied?; (3) Should the procedures used to impose disciplinary sanctions conform to the existing but varying procedures and standards for faculty, staff and students, or should a new and common process be developed?; and (4) May only victims of sexual harassment bring complaints or may others do so on their behalf?

There was considerable discussion within the Task Force about the advisability of permitting informal resolution of complaints prior to the institution of formal disciplinary procedures. Some feared that any informal procedure could result in the victim of harassment being talked out of filing a formal complaint. This concern focused specifically on the resolution of complaints brought by students at the departmental or collegiate level, where it was feared that the power imbalance between faculty members

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[5] Kyriaki v. Western Electric Company, 647 F.2d 388 (3rd Cir. 1981).

and students was simply too great to permit justice to be done. On the other hand, some faculty members cited examples of successful treatment of a variety of complaints by collegiate ombudsmen and argued that many students would find it easier to take a complaint to someone they knew rather than to a stranger in the Affirmative Action Office. The eventual decision of the Task Force was to recommend that one could bring a complaint, formal or informal, to a variety of persons and offices, but that the Affirmative Action Office would be informed of all such complaints.

Another issue the Task Force wrestled with was how to investigate formal complaints of sexual harassment. Under the previous policy the University had designated as the principal investigator the Dean or Vice President responsible for the unit in which the harassment was alleged to have occurred. In practice, however, the Office of Affirmative Action, to which most complaints were initially brought, often actually conducted the investigation. Consultation would then be held with other colleagues as well as the appropriate Dean or Vice President to arrive at a final disposition of the case. The Task Force's review of the policies of other institutions showed that some institutions used a separately constituted formal panel as an investigative and sanctioning body. Although this alternative approach was attractive to some members of the Task Force, it was rejected in favor of modifying the current practice because of concerns that the separate formal panel approach could discourage some complainants from coming forward.

A third issue the Task Force confronted was whether a common procedure and sanctions should be developed to apply to all who were accused of harassment, whether faculty, staff or students. The difficulty with the superficially attractive notion of a common procedure was that existing disciplinary procedures already mandated different treatment for faculty, staff, and students.[6] After some discussion the Task Force decided not to

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[6]For example, in the case of a faculty member, a full-blown adversarial hearing is required before disciplinary action can be taken. For the staff, on the other hand, less elaborate due process procedures precede the imposition of discipline. Staff members have the right after disciplinary sanctions have been imposed to use multiple-step grievance procedures. Finally, the standards and procedures relating to the disciplining of students vary from those governing either faculty or staff.

recommend the development of a common procedure and sanctions and to instead employ the disciplinary procedures which would normally apply to the individual.

One related issue which claimed some attention was what to do when a faculty member's conduct was judged to be an immediate threat to the physical or psychological well-being of a student or students. Existing university policy did not permit a faculty member's status to be altered in any way prior to the exhaustion of all due process rights, unless there was an ongoing riot on campus. The Task Force recommended that the Vice President for Academic Affairs be given the authority to remove a faculty member from the classroom when his or her continued presence was adjudged by the Vice President to pose a danger to one or more students.[7]

A fourth procedural issue which the Task Force addressed was the question of who could bring a complaint which would initiate the formal investigation which could lead to sanctions. In one or two instances under the prior policy, complaints had been brought by individuals who did not have the formal authorization to speak or act for the alleged victim, but who claimed they were acting out of concern for others. After considerable discussion the Task Force decided to recommend that complaints could be brought only by actual victims of a violation of the policy, or by persons formally authorized to act on the victim's behalf. Among those who would be considered victims under the policy, however, would be students, faculty or staff who had been disadvantaged by an improper amorous relationship between a faculty member and another student, a supervisor and another supervisee, or colleagues.

A related issue was whether the policy would permit anonymous complaints to be pursued. There was not much disagreement within the

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[7]Because of the nature of the disciplinary procedures for students and staff, no comparable situation could arise for accused individuals in those groups.

group that the imposition of sanctions in such circumstances would be unjust. No investigation would be undertaken and no discipline imposed without authorization from the complainant to inform the accused of the nature of the complaint against him or her, and of the identity of the person bringing the complaint. Every effort would be made to prevent retaliation against a complainant, and in fact some of the options available to the University to protect complainants were spelled out in the final Task Force recommendations.

With most of the foregoing issues decided, the group turned its attention to two final tasks: recommending a statement on consensual relations between faculty and students and developing a plan for educating the University community on the new policy and procedures. The basic principle of the statement on consensual relations between faculty and students was that amorous relations between teachers and those for whom they were responsible were forbidden. The statement further suggested that this principle prohibited amorous relationships between faculty members and graduate students in their departments, since any given faculty member might be called upon to serve on a graduate student's committee, vote on the allocation of financial aid, or make other decisions which could affect the career of a graduate student. The right of all students to be judged without conflict of interest was strongly affirmed. The language of the proposed consensual relations statement was sweeping enough to be susceptible to interpretation as interdicting all amorous relations between students and faculty, no matter what their age and status and no matter how unlikely that a conflict of interest would result from a given relationship. The Task Force's intent was not that sweeping, but it did recommend that the University ban all amorous relationships which in any way posed a threat to the integrity of the academic process or the emotional well-being of students.

The section of the Task Force's final report dealing with educating the University community on the new policy and procedures was not controversial. The sub-committee charged with developing a plan to this end brought a comprehensive proposal to the Task Force, which adopted the substance of the plan as proposed.

In the spring of 1986, the Task Force completed its work and made its report to the President. The report as submitted had the support of all the members of the Task Force and represented what had become the common view of a quite diverse set of people, representing a wide variety of colleges, disciplines, worksettings and previous involvement in the Task Force's issues. Given the variety of issues addressed and decided upon, and the sensitivity of many of these issues, the degree of unanimity achieved was a tribute to the intelligence, patience and good will of the Task Force members. That the group was proud of its work and united in support of it became, moreover, an important element in the discussions which followed as the report was submitted to the University's various constituent groups. Had there been division within the Task Force, it might not have been possible to complete the adoption of the policy substantially as proposed, particularly given some of the reactions to the proposed statement on consensual relations.

Following the University of Iowa's long-standing practice with respect to proposed university policies, the Task Force report was transmitted to the constituent campus faculty, staff, and student groups for their review and comment by President Freedman. The policy was also sent for comment to the University Council on the Status of Women, whose role is to address specifically the concerns of women at the University.

The constituencies responded to the President in the late spring and early summer of 1986. As would be expected, some groups responded more critically than others. The Staff Council responded in a favorable way shortly after receiving the policy. Both the Student Senate and the Collegiate Associations Council took exception to those portions of the policy prohibiting consensual relationships between teachers and students. The policy was particularly unpalatable to the Graduate Student Senate, a constituent assembly of the Collegiate Associations Council which represented the views of teaching assistants in particular.[8]

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[8]Apparently the Graduate Student Senate took the position that graduate students who were teachers ought to be free to form romantic ties with whomever they chose, including those whom they were currently teaching.

The Faculty Council, as well as individual faculty members, also responded with concerns about the breadth of the prohibition of consensual relationships and about the constraints the sexual harassment policy might place on classroom teaching. It was feared that the Policy on Consensual Relationships would be read so broadly as to prohibit a relationship between, for example, a full professor in the College of Law and a person taking a Saturday or evening class in pottery. Others were concerned that the teaching of modern (or ancient) literature or medical subjects would be adversely affected.

The initial response of the Council on the Status of Women focused on the general thrust of the policy and supported its adoption in principle. The Council's second response focused on clarifying language throughout the Task Force report, and centered more specifically on the question of procedures by which investigations and disciplinary actions were to be taken. The Council strongly urged that allegations of violation of the sexual harassment policy be investigated by a panel of twenty-one individuals drawn from the ranks of faculty, staff and students to be presided over by the Director of the Office of Affirmative Action.

The comments both from individuals and from the constituent bodies were reviewed by the President at some length. The volume and extent of the comments from members of the University community was larger than usual. Moreover, the Task Force's report as submitted to the President was not drafted in regulatory form. Therefore, to assist him in formulating the final version of the policy, the President called upon a member of the law faculty to consider the comments and recommendations of the various constituents and individuals in light of the Task Force's report and to provide him with a policy which would convert the Task Force's report into University regulation form and address the recommendations made by those who had commented on the policy.

As the report and recommendations were converted into regulation form several areas of the report needing clarification were discovered. By clarifying these areas, many of the specific concerns raised by individuals and the constituencies were addressed and the document was made clearer for those who would be guided by it and disciplined under it.

Three substantive, rather than semantic, matters remained after the report was converted into University regulation form. One was the question of the extent of the prohibition on consensual relationships. The original intent of the Task Force had been to address the core problem of consensual relationships, that is, to address those relationships between teachers and those students for whom they were currently responsible. The policy as drafted by the Task Force could be read to discourage consensual relationships between faculty and students in general. Consequently, it was revised to reflect more closely the original intent. As revised, the policy prohibited amorous relationships between teachers and those for whom they were currently responsible, both in the classroom and in any supervisory capacity, such as might be true with graduate students. The revised version of the policy is, if anything, firmer in its prohibition of such relationships.

The question of a student-faculty relationship outside of the instructional context which may affect the student was treated as a conflict-of-interest issue. An example of such a situation would be participation by a faculty member in allocating departmental financial aid where one of the applicants is a person with whom he or she has or has had an amorous relationship. The policy was revised to state that a faculty member who would ordinarily participate in making a decision which would affect a student with whom he or she has previously had or is currently having an amorous relationships must not participate in that decision-making process. The failure to reveal that a conflict-of-interest exists is deemed a serious violation of the University's Statement on Professional Ethics and Academic Responsibility which could be subject to sanctions.

The second substantive issue addressed in the redrafting was the definition of sexual harassment as it related to the less specific forms of sexual harassment. In the original Task Force report, sexual harassment was defined to include staring, unnecessary touching, telling sexually explicit jokes or making remarks concerning sexual experience, clothing or appearance of a student, or making other such comments of a sexual nature. Some comments had been received by the President expressing concern about the extent to which it was appropriate, in view of the freedom of speech of teachers and of academic freedom, to threaten to punish teachers for any classroom language. Other concerns centered on the wisdom of labelling as

sexual harassment behavior which was susceptible of alternative interpretations such as staring, unnecessary touching or making remarks about a person's clothing. With respect to the "teaching technique" issue, the policy was revised to make clear, as the Task Force had intended, that it did not prohibit conduct "legitimately related to the subject matter of a course." With respect to the subtler forms of behavior, the policy was revised to define patterns of such conduct as sexual harassment. "Staring" was dropped from the list of examples on the theory that it was absolutely too difficult to adjudge and in the belief that any instance in which staring would be an issue would undoubtedly yield other evidence of harassment of a less problematic kind.

The last substantive issue which was considered in the redrafting stage by the President was a recommendation that the procedure by which all sexual harassment complaints were to be addressed should be changed. After a review of the work of the Task Force on this issue, it was decided that the procedures recommended in the report should not be changed.

In July of 1986, the President promulgated the new policy. In a memorandum addressed to the entire University community, he reviewed the process by which the policy had been developed, the process by which the University community had been consulted and the process by which the policy had been reviewed and redrafted. He also noted the competing interests involved:

> At times a tension exists between the University's responsibility to discourage sexual harassment and its responsibility to preserve other rights and freedoms essential to the academic enterprise, such as the rights of free speech, academic freedom, due process, and the freedom of association in the private lives of faculty, staff and students. Consideration of these tensions dictated that in a few instances the Task Force recommended that the recommendation be narrowed somewhat. In cases of doubt, however, I followed the recommendations of the Task Force.

In the wake of the promulgation of the policy, there has been some increased interest in the filing of complaints and substantially increased interest in understanding the limits of appropriate behavior. There were special workshops conducted for teaching assistants in various departments in

which apprehensions had surfaced. The workshops focused on helping the teaching assistants to understand the effect the policy would or would not have on the way that they arranged their personal lives. Moreover, groups of faculty and other teachers who were concerned about the impact of the policy on, for example, the teaching of literature, were also visited by members of the University administration to explain that the policy did not purport to restrict the ability of faculty to consider the entire range of human behavior in the classroom.

As the first year under the University of Iowa's new policy comes to a close, those who were involved in the development of the University's revised statement on sexual harassment and consensual relationships continue to believe that the time, effort and energy devoted to the task has been more than compensated for by the results. The document has led to a heightened awareness at the University of the need to treat all persons with whom we work and study with dignity and respect. As President Freedman said in issuing the policy:

> My hope is that this new policy will accomplish its purpose of clarifying the standards of conduct expected by the University in this sensitive area. To the extent that either sexual harassment or compromising consensual relationships between faculty members and their students may have occurred in the past, I expect this policy to discourage such conduct in the future. If instances of inappropriate and unprofessional behavior in this area should occur, I anticipate that the policy issued today will provide a fair and effective mechanism for dealing with them.

Given the experience of the past year, we believe that the University's policy goes far toward fulfilling the goals President Freedman set for it.

IV. RESOURCES

RECENT LEGAL DEVELOPMENTS IN SEXUAL HARASSMENT

February 27 - 28, 1987

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I. INTRODUCTION

With the advent of Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986) sexual harassment as a type of sexual discrimination in terms, conditions, or privileges of employment prohibited by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2, is no longer a novel theory. Courts must now recognize that actionable sexual harassment includes not only harassment in which a supervisor demands sexual consideration in exchange for job benefits (quid pro quo) but also harassment that creates an offensive environment (condition of work). Meritor, at 2404, citing Henson v. City of Dundee, 682 F.2d 897, 908, n. 18 (11th Cir. 1981). Sexual harassment of students also has been increasingly accepted as a justification for disciplinary action against a faculty member, generally under a charge of "unethical conduct." This outline accordingly will deal mainly with such types of cases while also examining other developments in sexual harassment law which have occurred recently.

II. DEFINITION OF SEXUAL HARASSMENT

A. In Meritor the U.S. Supreme Court adopted the EEOC's definition of "sexual harassment." Meritor at 2405. The EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11, issued November 10, 1980, define sexual harassment to be:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection

> of such conduct by an individual is used as the basis for employment decisions affecting such individual, [both quid pro quo harassment] or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment [condition of work harassment].

B. Courts have interpolated and adopted the EEOC definition as applicable in teacher/student harassment cases as well.

III. DEVELOPMENT OF THE QUID PRO QUO THEORY OF SEXUAL HARASSMENT

A. Courts began to recognize quid pro quo harassment as violating Title VII in the late 1970's. Some situations in which such harassment was found:

1. Solicitations by supervisor for after hours social activities, repeated sexual remarks, repeated suggestions that consent to a sexual affair would enhance employment status which, when resisted, led to the employee's harassment and abolishment of job. Barnes v. Costle, 561 F. 2d 983 (D.C. Cir. 1977).

2. Supervisor's sexual advances, threats of recrimination and physical force which, when resisted, led to the employee's transfer to an inferior position, false evaluations, lay-off and dismissal. Tomkins v. Public Serv. Elec. & Gas Co., 568 F. 2d 1044 (3rd Cir. 1977).

3. Supervisor's sexual remarks and innuendos, sexual cartoons left on employee's desk, a demand the employee share motel room on business trip and her discharge upon refusal. Munford v. Barnes & Co., 441 F. Supp 459 (E.D. Mich. 1977).

B. There is strict liability for an employer for quid pro quo harassment by a supervising employee. Meritor at 2408.

1. This is based on the common law of agency, that the master is liable for the tortious acts of his servant if the agency relationship aids the servant in accomplishing the tort. Restatement (Second) of Agency §219 (2)(d)(1957), cited with approval in Henson at 910, n. 21.

C. No damages are recoverable for mental suffering or emotional damages for quid pro quo harassment. Henson at 905. Only actual economic damages such as back pay, lost benefits or injunctive relief.

IV. DEVELOPMENT OF THE "OFFENSIVE ENVIRONMENT" THEORY OF SEXUAL HARASSMENT

Bundy v. Jackson, 641 F.2d 934 (2nd Cir. 1981) was the seminal offensive environment sexual harassment case. The court there held that sexual advances by a supervisor in the workplace could be sexual harassment even though there was no loss of tangible employment benefits to the employee. Since 1981 the theory of offensive or hostile working environment sexual harassment has been developed, as described below.

A. Prior to the Meritor decision circuit courts were split as to whether respondeat superior was required to hold an employer liable for acts of supervisory employees in offensive environment cases or if strict liability should apply.

1. Federal courts which held respondeat superior applied were:

(a) Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Henson, a female dispatcher in the city of Dundee's police department, alleged she had received numerous demeaning sexual inquiries and advances from her police chief; that she complained to the city manager but no action was taken. She brought a Title VII sex discrimination action against the employer for the chief's actions.

The court held an offensive or hostile working environment could be a violation of Title VII of the Civil Rights Act of 1964 irrespective of whether a plaintiff suffered tangible job detriment, relying on Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971, cert. denied, 406 U.S. 957 (1972), a race discrimination case, and also Bundy v. Jackson, supra.

Henson established five criteria which had to be met to prove a Title VII claim against an employer for a hostile work environment: They were:

(1) the employee belonged to a protected group; (i.e. the employee was a man or a woman)

(2) the employee was subject to unwelcomed sexual harassment; (see EEOC guidelines, supra)

(3) the harassment complained of was based on sex; [Note: Henson held that in cases where a supervisor made sexual overtures to workers of both sexes, or where the conduct complained was equally offensive to male and female workers, it was not discrimination based on sex because men and women got equal treatment. Henson at 904. In such cases Henson said the plaintiff might only have a common law remedy such as assault, battery, invasion of privacy or intentional inflication of emotional distress. For a contrary view, see Howard v. Best, infra.]

(4) the harassment complained of affected a "term, condition, or privilege" of employment; (Henson held the state of the psychological well being" was such.)

(5) Respondeat superior. Henson held that the supervisor must know or should have known of the sexually hostile environment to hold the employer responsible. Its rationale for that position was that when a supervisor gratuitously insulted an employee, he generally did so for his own reasons by his own means and therefore acted outside the actual or apparent scope of authority he possessed as a supervisor. Henson at 910. One judge dissented from that view in Henson.

Henson distinguished the liability of an employer described above from that of one in a quid pro quo case where there is a tangible job detriment to the employee. Henson recognized, as discussed supra, that in such cases there would be strict liability for sex discrimination by the supervisor and the employer, citing Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979.)

(b) Katz v. Dole, 709 F.2d 251 (4th Cir. 1983). Katz, a former federal air traffic controller, alleged she had been subjected to vulgar and offensive epithets by her coworkers and her supervisor. Katz sued the Secretary of the Department of Transportation for sex discrimination under Title VII.

The court, relying on Henson and Bundy, found that an offensive environment case was actionable under Title VII, but that the plaintiff had the burden of proof that the employer had actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action about it. The court held the employer may rebut such a case (1) by

showing the events did not take place or that they were isolated or genuinely trivial or (2) by pointing to prompt remedial action reasonably calculated to end the harassment. Katz at 256. Note: The court noted in its opinion that the FAA did have a policy against sexual harassment, that it was not effective and was known not to be effective by FAA supervisory personnel, indicating a printed policy against sexual harassment would not be a sufficient defense in an offensive environment case.

2. Federal courts which held strict liability was the appropriate standard to apply to employers in offensive environment cases were:

(a) Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985), cert. granted sub nom, Meritor Savings Bank, FSB v. Vinson, 106 S. Ct. 57 (1985). A terminated bank employee sued her supervisor and the employer bank alleging sex discrimination under Title VII in that her supervisor asked her, subsequent to her promotion, for sexual favors in return for having previously granted her the promotion. The district court found for the employer on the basis that the employee, Vincent, was not required to grant Taylor, her supervisor, sex for the promotion and that the relationship was a voluntary one. Vincent v. Taylor, 23 FEP 37 (D.D.C. 1980). The circuit court reversed and found a hostile working environment theory had not been considered by the trial court and that under Bundy v. Jackson, supra, a woman need not prove resistance to overtures to find sexual harassment.

The court then held that Title VII imposed on a employer without specific notice of sexual harassment by supervisory personnel, responsibility for a substantially discriminatory work environment. Vinson at 147. The court relied upon the EEOC guidelines on discrimination because of sex, 29 CFR § 1604.1-1604.11 (1984) as the basis for its decision and noted the slight amount of legislative history available indicated the prospect of vicarious employer accountability was raised before Congress during debate on Title VII. Vinson at 148-149.

The court stated that "to hold that an employer cannot be reached for Title VII violations unknown to him is, too, to open the door to circumvention of Title VII by the simple expedient of looking the other way, even as signs of discriminatory practice begin to gather on the horizon." Vinson at 151.

(b) Jeppsen v. Wunnicke, 611 F.Supp. 78 (D.C. Alaska

1985). On a motion for ruling on the law of the case as to whether proof of an employer's knowledge of the creation of a hostile working environment by an employee's supervisor was necessary to prove a case of sex discrimination under Title VII, the court followed Vinson, supra, and rejected Henson, supra, and held that no knowledge was necessary by the employer to prove a hostile work environment case against the employer. The court distinguished Henson because Henson relied upon the decision in the Vinson district court case which was subsequently overturned and also relied on language in Bundy where the court did not address this specific issue.

B. State courts also were split on the employer liability issue: Compare Glasglow to Howard.

1. Glasglow v. Georgia Pacific, 103 Wn.2d 401, 693 P.2d 708 (1985). Female employees brought suit against the employer and others for sex discrimination and outrage alleging a coworker fondled them and used abusive language to them, that they informed the plant manager who allegedly did nothing. The court held that in a hostile environment case the employee must show that the employer authorized, knew or should have known of the harassment and failed to take reasonably prompt and adequate corrective action to be held liable. The court stated the employer may ordinarily avoid liability by taking prompt and adequate corrective action when it learns that an employee is being sexually harassed.

2. Howard v. Best, 484 A.2d 958 (D.C. App. 1984). Former pharmacy faculty member whose contract was not renewed sued Howard University, her dean, and other faculty members for sexual harassment, breach of contract, intentional infliction of emotional distress and defamation. Best alleged inter alia that the dean made suggestive remarks and fondled Best at an academic conference in front of her peers. The court applied Bundy v. Jackson, supra, and found sexual harassment which creates a discriminatory environment but which does not cause an employee loss of any tangible work benefits is nevertheless a term, condition or priviledge of employee covered under the District of Columbia Human Rights Act.

Note: The court cited Henson for the elements of a sexual harassment claim, but disagreed with Henson that if overtures are equally offensive to employees of both sexes, there is no cause of action. Howard at 979, n.24. Howard said the proof that male employees are offended by harassment directed at female employees

may instead bolster a female employee's case.

The court in Howard rejected the Henson and Katz approach of respondeat superior in a hostile environment case and adopted the strict liability approach of Miller v. Bank of America, supra. The court accordingly stated that upon the plaintiff's establishing a case of sexual harassment at a new trial, the jury was to be instructed that the University was to be held liable for sexual harassment. Howard at 983-984. The court apparently based its decision on the fact that the vice president for health affairs at Howard did not conduct an independent review of the dean's nonrenewal of Best's appointment and that his adoption of it constituted full knowledge and acceptance of the dean's actions in the eyes of the court.

C. Meritor Savings Bank FSB v. Vinson

1. Justice Rehnquist, writing the majority opinion, joined by three justices, first held that an offensive sexual environment can constitute sex discrimination under Title VII. To be offensive the harassment:

(a) Must be severe and pervasive

(b) Must be unwelcome

(i) Evidence of a plaintiff's sexually provocative speech and dress may be relevant to issue of "unwelcomeness"

2. Rehnquist then rejected the D.C. Circuit's position that there should be strict liability for an employer for offensive environment harassment.

(a) Instead, Rehnquist followed the 11th Circuit in Henson saying that a supervisor must first be acting as employer's agent before liability attaches or the supervisor's advances were so pervasive and continuous that the employer must have been conscious of them.

(i) "Agent" was defined by Rehnquist as an employee-supervisor who exercises authority actually delegated by the employer to make or threaten to make employment decisions affecting subordinates.

(b) Justice Marshall's concurring opinion, joined by 3 justices, would have adopted strict liability for an employer.

3. Rehnquist then wrote that the mere existence of a general grievance procedure does not necessarily provide an employer a shield against litigation.

D. Elements of a sexual harassment claim post-Meritor

The Supreme Court did not address whether its holding in McDonnell Douglas Corp v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973) applies to a case of sexual harassment. Lower courts therefore have been left to find the proper fit of the McDonnell Douglas analysis to sexual harassment, e.g.:

1. A harassment claim does not fit neatly in a McDonnell-Douglas v. Green analysis because once a plaintiff establishes that she was harassed and the employer was involved via respondeat superior, it is difficult to imagine how the employer could articulate a legitimate reason for the harassment. Volk v. Coler, 638 F. Supp 1555, 1557 (C.D. Ill. 1986)

2. Courts ruling on Title VII harassment therefore have developed a different set of elements which, if proven, constitute sexual harassment:

(a) The employee belongs to a protected group;

(b) The employee was subject to unwelcome harassment;

(c) The harassment was based on sex;

(d) The harassment complained of affected a term, condition, or privledge of employment;

(e) Respondeat superior, that is, that the employer knew or should have known of the harassment and failed to take prompt remedial action

(f) The employer acted reasonably under the circumstances.

Volk at 1557 - 8, citing Henson for elements (a) - (e) and DeGrace v. Rumsfeld, 614 F. 2d 796 (1st Cir 1980) for element (f).

3. It is reasonable to assume that in a discrimination claim based on sexual harassment the employer ought to be given the opportunity to articulate legitimate nondiscriminatory reasons

for its conduct. Using a McDonnell-Douglas analysis a prima facie case would be:

(a) The employee is a member of a protected group;

(b) The employee was subject to unwelcome sexual harassment;

(c) The harassment complained of affected a term, condition, or privledge of employment (quid pro quo or created a hostile environment) and

(d) The employee is subject to liability based on agency principles.

Bowen v. Valley Camp of Utah, Inc.; 639 F. Supp. 1199, 1204 (D. Utah 1986).

4. There is no reason to suggest a specific prima facie case for a hostile environment claim as, in contrast to a disparate treatment claim, there is no elusive factual question of intentional discrimination, except in the exceedingly atypical case of a bisexual supervisor. Jones v. Flagship International d/b/a Sky Chefs, 41 FEP cases 358, 363, n. 5 (5th Cir. 1986).

5. In trying offensive environment cases the district courts should employ normal principles of pleading and proof allocation. These principles may, in some cases, dictate that the allocation scheme vary in the individual case because of superior knowledge on the party of one party or other similar factors. Jones at 363, n.5.

E. Limited damages continue to be recoverable only under an offensive environment theory in federal court post-Meritor.

1. Under an offensive or hostile environment theory brought under Title VII, a plaintiff cannot recover for mental suffering or emotional distress. Meritor at 2408, Bundy v. Jackson, supra at 946 n. 12, Henson v. City of Dundee, supra at 905. Nominal damages only can be recovered and, thereby, attorney's fees. Henson, Id.

2. Accord, Scott v. Sears, Roebuck & Co., 605 F. Supp. 1047 (N.D. Ill. 1985), aff'd, 798 F. 2d 210 (7th Cir. 1986). There a discharged employee brought an action against her employer claiming sexual harassment through a hostile environment and asked for lost

wages and benefits. The court acknowledged that a sexual harassment cause of action could be established by stating the facts sufficient to show there was a hostile environment, citing Bundy, supra. However, the court noted that damages for emotional distress and mental suffering are not recoverable under Title VII, citing Henson and that therefore in a hostile environment case a plaintiff is entitled at most to nominal damages and attorneys' fees and not lost wages and benefits.

F. Factors courts have considered in determining if treatment received arises to a creation of a hostile environment:

1. Pre-Meritor:

(a) The treatment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. Henson, supra at 904.

(b) If the work environment has been poisoned by sexual insults and demeaning propositions. Bundy, supra at 943.

(c) The test to determine whether the plaintiff has met her burden of proof is essentially a balancing test, in which the trier of fact should consider, inter alia, the amount and nature of the conduct, the plaintiff's response to such conduct, and the relationship between the harassing party and the plaintiff. In other words, the totality of the circumstances must be considered. Howard, supra at 981.

(d) The mere utterance of a [sexual] epithet which engenders offensive feelings in an employee does not affect the terms, conditions, or privileges of employment to a sufficiently significant degree to violate Title VII. Henson, supra at 904.

(e) Title VII is not a clean language act and it does not require employers to extirpate all signs of centuries-old prejudices. Katz, supra at 256.

(f) Isolated incidents, flirting and characterizations of comments as propositions by inference only does not constitute sexual harassment. Scott v. Sears Roebuck & Co., supra, at 1053-1054.

(g) No specific number of incidents and no specific level of egregiousness can be set forth; nor is the fact that each

incident may not be individually actionable determinative. Howard, supra at 980.

(h) The standard for showing emotional damages as a result of sexual harassment should be lower than what is required by a plaintiff to prove intentional infliction of emotional distress because the higher standard of proof would not serve the broad purpose of antidiscrimination acts. Howard, supra at 980, n. 26.

2. Post-Meritor

(a) Trier of fact must consider such objective and subjective factors as the nature of the alleged harassment, the background and experience of the plaintiff, her co-workers, and supervisors; the totality of her physical work area; the lexicon of obscenity that pervaded the workplace environment before and after she began work and her reasonable expectations upon voluntarily entering that environment. Rabidue v. Osceola Refining Co., 805 F. 2d 611 (6th Cir 1986).

(b) Sexually oriented poster displays in male employees' offices had a de minimus effect on plaintiff's work environment when considered in the context of a society that condones, publicly features and commercially exploits open displays of written and pictorial erotica. Rabidue.

(c) Trier of fact must adopt the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances. Rabidue.

(d) The conduct must interfere with a reasonable individual's work performance and seriously affect his or her psychological well-being. Rabidue.

(e) Insufficient evidence was produced to show co-worker's request that plaintiff join him at a male restaurant after work together with his winks and suggestions he give her a rubdown were so pervasive or psychologically debilitating that they affected plaintiff's ability to perform on the job. Comments and conduct of other employees were too isolated and lacking the repetitive and debilitating effect necessary to maintain hostile environment claim. Scott v. Sears, Roebuck & Co., 798 F. 2d 210 (7th Cir. 1986).

(f) An obscene message sent on one occasion, rudeness without a disclosed reason, and an accepted refusal of a date do not equate to sexual harassment which creates a hostile or offensive environment. Freedman v. American Standard, 41 F.E.P. 471, 476 (D.N.J.1986)

(g) A title VII violation for sexual harassment requires more than occasional foul language or gestures directed towards an employee. While such conduct is certainly to be discouraged, every instance of bad judgement on the part of a supervisor does not constitute a Title VII violation. Volk v. Coler, 638 F. Supp. 1555, 1556-7 (C.D. Ill. 1986)

(h) When conduct reaches the point to where an employee is continually subjected to demeaning and offensive language before his colleagues by a supervisor such activity necessarily has the effect of altering the conditions of his employment within the meaning of Title VII. Volk at 1559.

(i) Sexually harassing incidents involving other employees do not bear on an individual claim of sexual harassment in the absence of evidence that such incidents affected the plaintiff's psychological wellbeing. Jones v. Flagship International d/b/a Sky Chefs, 41 FEP Cases 358, 363, n.7 (5th Cir. 1986).

(j) Allegations that an employee was propositioned on two business trips and the use of bare-breasted mermaids as table decorations at the office Christmas party, if true, were not sufficiently pervasive harassment to constitute a hostile working environment. Jones at 363.

G. Adequacy of Employer's Corrective Action.

1. Barrett v. Omaha National Bank, 726 F.2d 426 (8th Cir. 1983). Bank employee complained to her supervisor of her coworker's behavior, his talking about sexual activity and touching her in an offensive manner. The coworker was reprimanded and was placed on probation for 90 days and warned that any further misconduct would result in his discharge. The employee subsequently left the bank and brought an action alleging sexual harassment against the employer alleging the action taken by the employer against the coworker was insufficient. The court found that the bank had acted immediately and appropriately and that the law did not require firing the coworker as a remedy for sexual harassment.

H. Retaliation

1. Jenkins v. Orkin Exterminating Co., 646 F. Supp. 1274 (E.D. Tex. 1986). Female employee confided in Jenkins, a male co-worker, that she was being pressured to date their supervisor. Jenkins telephoned the supervisor's supervisor and advised him of the complaint. Despite his record as an outstanding salesman, Jenkins subsequently received his first and only disciplinary notice from his supervisor and then was terminated one month later.

Jenkins sued the employer alleging retaliation. The court, finding for Jenkins, held it was not necessary for the court to conclude whether or not the alledged complaint regarding sexual harassment was in fact a violation of Title VII but only that Jenkins had a good faith belief that the complaint was a genuine one and one that warranted investigation and that Jenkins had a reasonable belief a violation of Title VII had occurred. Additionally, the court found Jenkins' opposition activities were not disruptive to the employment sphere and were appropriate as to their time, place and manner and were protected activities.

IV. ALTERNATIVE THEORIES USED TO RECOVER DAMAGES FOR SEXUAL HARASSMENT

A. Intention Infliction of Emotional Distress.

Because monetary damages for mental anguish and emotional distress are not recoverable in federal court for sexual harassment, many plaintiffs seek remedy under state law which provides for recovery for intentional infliction of emotional distress. Recent developments in such cases are as follows:

1. The creation of a hostile working environment was sufficient to constitute a prima facie case of intentional infliction of emotional distress. Howard, supra 986. Because the sexually hostile acts of a dean towards a faculty member took place during faculty, administrative or other professional meetings attended by the faculty member and the dean in their professional capacities a jury could find that the intentional infliction of emotional distress arose out of and in the course of employment, thereby subjecting the University to liability. Howard, supra at 987.

2. Even in the presence of such reprehensible behavior as the fondling of private parts of the body by a co-worker and the

failure of a supervisory employee to take action despite complaints to him, the strict limiting parameters of the tort of intentional infliction of emotional distress apply. Glasgow, supra at 408.

B. Denial of Equal Protection.

1. Estate of Scott by Scott by deLeon, 603 F. Supp. 1328 (D.C. Mich. 1985). The personal representative of a pharmaceutical assistant at the University of Michigan alleged violation of the equal protection clause by the assistant's supervisor through that person's sexual harassment of her in the form of letters, notes, and threats to coerce her into sexual relations. The assistant allegedly complained to three university administrators about it but nothing was done as there had been no filing of a formal complaint by her with personnel. The assistant died of a drug overdose. The court found a violation of equal protection because harassment was the sort of invidious gender discrimination that the equal protection clause forbade.

2. Bohen v. City of East Chicago, 799 F. 2d 1180 (1986). A female fire dispatcher alleged she had suffered numerous incidents of harassment by supervisory personnel and that this represented the accepted practice of the department, indeed, she had been warned in her hiring interview that conditions would be sexually oppressive. The court held there would be a violation of the equal protection clause if the employee could show intentional discrimination, that there was no need to prove an altering of condition of work as would be required under Title VII.

The court also stated that a defense to a claim of violation of the equal protection clause would be that the employee suffered harassment because of personal factors and not because of sex or that the harassment was justified or had a legitimate business purpose.

C. Title IX of the Education Amendments of 1972.

1. A cause of action for sexual harassment was recognized possibly to lie under Title IX in Alexander v. Yale University, 459 F.Supp. 1 (D.C. Conn. 1977) in which a student alledged that a poor grade resulted from her rejection of a professor's offer of an "A" in return for sex.

Note: The court in Alexander was reluctant to endorse an offensive environment theory of discrimination; it dismissed a male

professor's claim that his teaching effort had been hampered by an "atmosphere of distrust" of male professors due to sexual advances by faculty to students as beyond the scope of Title IX. Alexander at 3.

2. Title IX has also been held to allow actions for discrimination in employment. North Haven Board of Education v. Bell, 456 U.S. 512, 102 S. Ct. 1912 (1982). Note, however, that that ruling has been limited by some courts to apply only in cases in which a plaintiff has no recourse to a remedial statute such as Title VII. Storey v. Board of Regents of the University of Wisconsin, 600 F. Supp. 838 (W.D. Wis. 1985).

3. The decision in Alexander is now subject to the restrictions imposed by Grove City College v. Bell, 104 S. Ct. 1211 (1984) which limited Title IX's enforceability only to those programs or activities receiving federal financial assistance.

4. Accord, Walters v. President and Fellows of Harvard College, 601 F. Supp. 867 (D.C. Mass. 1985). There an employee in the buildings and grounds department of Harvard alleged sexual harassment had led to her having to quit her job, citing, inter alia, Title IX of the 1972 Education Amendments, 20 U.S.C. § 1681 et seq. as a basis for her claims. The court ruled that although employment discrimination comes within the prohibition of Title IX (citing North Haven Board of Education) such employment must be under an "education program or activity." The court held that that contemplated something more directly related to the delivery of educational services than the purely custodial services delivered by the buildings and grounds department.

V. SEXUAL HARASSMENT AS GROUNDS FOR DISCIPLINE IN ACADEMIC DISCIPLINARY CASES

A. Sufficiency of charge alleged.

1. Cockburn v. Santa Monica Community College District, 207 Cal. Rptr. 589, 161 C.A.3rd 734 (Cal. App. 2 Dist. 1984). Terminated instructor alleged the college's personnel commission's decision dismissing him from his position as an instructor and lab technician was excessive. The instructor had admitted having grabbed and kissed a student employee. There had been four prior complaints which had been received regarding his lewd comments and hands-on-contact, which he denied. The court found, despite a psychologist's opinion that the instructor could be rehabilitated

and perform his duties, that the commission's decision was not excessive because of the commission's "grave responsibilities to the college and their personnel, the professors, instructors and students they embrace, and to the general public." Cockburn at 597.

2. Brown v. California State Personnel Board, 213 Cal. Reptr. 53, 166 CA.3d 1151 (Cal. App. 3 Dist. 1985.) Criminal law associate professor brought an action to be reinstated at California State University at Sacramento (CSUS) because the four year delay by the college in bringing an action against him alleging a pattern and practice of sex discrimination meant that only a single charge of sexual harassment should have been considered. The court found the female students' original reluctance to come forward as witnesses against Brown an unpresuasive reason to delay action noting the disposition of the victim may be of interest in the exercise of discretion whether to prosecute or not, but that when CSUS made up its mind to act, it was able to persuade the formerly reluctant victims to participate.

The court then found the four year delay had acted as prejudice to Brown, even if all witnesses could remember the events clearly, because it was prejudicial to Brown's career in that the potential loss by Brown of four years of his efforts in an academic position at the outset of an academic career was a considerable change of position in reliance on the status quo which worked a sufficient prejudice to transform the unreasonable delay in this case to laches. Having thrown out the four earlier charges of sexual harassment because of laches, there was left only one allegation of a sexual advance without a threat of retaliation by the teacher. The court found that was insufficient to establish a "pattern or practice" of behavior, as had been alleged in the charge, and, as CSUS had no rule against student/faculty dating, the professor was to be reinstated.

3. Korf v. Ball State, 726 F.2d 1222 (7th Cir. 1984). A professor was found guilty of unethical conduct for his sexual advances to a male student by a University hearing committee which ultimately recommended his dismissal. The professor claimed the decision violated his constitutional rights to due process as his was the first dismissal for unethical conduct at Ball State and therefore he had inadequate notice or warning of the results of his conduct. The court said that common sense, reason and good judgment were adequate to warn him. Korf at 1227.

B. Due Process Due.

1. Levitt v. University of Texas at El Paso, 759 F.2d 1224 (5th Cir. 1985). Tenured professor of chemistry was terminated due to several complaints of sexual harassment from female students. The professor claimed violation of due process in the University's hearing on the charges. The court held that even if the University did not follow its own rules precisely, the professor was not denied any constitutionally guaranteed due process. The court did note that the professor might have had a breach of contract action or one arising under state law for the failure of the university to follow its own rules in his termination.

C. Consent of Student Immaterial.

1. Korf v. Ball, supra. The consent of a student to a homosexual relationship with a professor was not at issue in the review of the faculty member's dismissal by the court as the charge against the professor was "exploiting students for his private advantage." The professor's conduct had to be judged in the context of the relationship between a professor and his students in an academic environment. The court noted that "[u]niversity professors occupy an important place in our society and have concomitant ethical obligations." The court stated the AAUP Statement on Professional Ethics makes that clear: "2) . . . [The professor] demonstrates respect for the student as an individual and adheres to his proper role as an intellectual guide and counselor . . . ." Korf at 1227.

2. Naragon v. Wharton, 737 F.2d 1403 (5th Cir. 1984). A music teaching assistant's constitutional rights to equal protection were held by the court not to have been violated when she was not given teaching duties at LSU, but was reappointed with the same compensation, after having a consensual lesbian relationship with a student. The court accepted the reasoning of the university's educators that intimacy between teacher and student is a breach of professional ethics and undermines the proper position and effectiveness of a teacher because of the perception of other students and noted that a teacher is in a position of trust to instruct the student. Naragon at 1405. The dissenting judge noted that a previous heterosexual relationship in the music department had gone unpunished and therefore felt there was a potential violation of equal protection in that the faculty member was being treated differently because of her sexual proclivities.

VI. DISCOVERABILITY OF ALLEGED VICTIM'S PAST SEXUAL CONDUCT

A. Priest v. Rotary, 98 FRD 755, 73 ALR Fed. 736 (N.D. Cal. 1983). An employer of a bar sought evidence of his waitress'/employee's sexual history to be used to defend against her allegation of his sexual harassment of her. The court held that evidence of a plaintiff's sexual history would be inadmissible to prove her propensity to act in conformity therewith. The court also rejected that such evidence could be used to show her "habit" of sexual activities. The court also found insufficient evidence that there was a "motive" involved which would allow disclosure of such information where the only motive alleged was a desire for retaliation by the employee against the employer and a desire for economic gain. The court said the purpose of the discovery request was to harass, intimidate and discourage the plaintiff in her efforts to prosecute the case.

VII. EFFECT OF STATE WORKERS' COMPENSATION STATUTES

A. Miller v. Lindenwood Female College, 616 F. Supp. 860 (E.D. Mo. 1985.) The court found the college was not liable for the infliction of emotional distress through the sexual harassment of the plaintiff employee by its agent as the employee's relief lay solely under Missouri's Workers' Compensation Act. Intentional acts of fellow employees causing emotional distress was within the Act's statutory definition of "accident" for which it provided recovery. The court further found that, if the agent was working as an independent agent for the college, the college would also not be liable to the employee. See also, Zabkowicz v. West Bend Co. 40 E.P.D. ¶ 36, 089 (7th Cir. 1986).

VIII. ADEQUACY OF DAMAGES RECEIVED

A. Micari v. Mann, 481 N.Y.S.2d 967 (Sup. 1984). Plaintiff students engaged in sexual acts with their acting teacher on his advice that that would release their inhibitions and improve their acting skills. They subsequently brought action for assault, battery and intentional infliction of emotional distress against the teacher as state law did not provide for a cause of sexual harassment in its education code. Each plaintiff received only $2,000 and no punitive damages from the jury despite a note delivered from the jury that it hoped that its decision would "serve as a future deterrent in sexual abuse and harassment behavior of teacher against student." The court held the failure

to award punitive damages grounds for a new trial solely on that issue unless the defendant immediately granted each plaintiff $5,000 in punitive damages.

SEX DISCRIMINATION: PREVENTING AND DEFENDING SEXUAL HARASSMENT CASES

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Institutional Policy and Grievance Procedures

I. Policy Formation and Adoption

A. Need for Policy

1. Institutional policy informs university constituency (faculty, staff, and students) of the principles applied to the educational and employment environment, including that sexual harassment is unacceptable.

2. Statement of policy, and adoption of grievance procedures to enforce policy, helps insulate the institution from liability for actions of its supervisors and employees.

a. Title VII, prohibiting sex discrimination in employment, has been held to include sexual harassment as a form of sex discrimination. The adoption of a policy prohibiting sexual harassment should help insulate the employer from vicarious liability due to actions of its supervisors. See Barnes v. Costle, 561 F. 2d 983 (D.C. Cir. 1977).

b. Title IX, prohibiting sex discrimination in educational programs or activities receiving federal financial assistance, has been implied to include sexual harassment as a form of sex discrimination. And while it is questionable whether an institution would be liable due to a faculty member's sexual harassment of a student, the adoption of a policy prohibiting the act would further help establish insulation as it does under Title VII. See Alexander v. Yale University, 459 F. Supp. 1 (D. Conn. 1977). Alexander v. Yale University, Civ. No. 77-277 (D. Conn. July 2, 1977), Aff'd, 631 F. 2d 178 (2d Cir. 1980).

B. Policy Statement

1. The policy should be sufficiently inclusive to cover the prohibition against sexual harassment in the working environment as well as the educational environment in order to cover all elements of the university community in one statement.

2. A definition of sexual harassment should be included to sufficiently inform community of the prohibited conduct, and establish notice that such conduct is actionable by the institution.

   a. "Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature constitute sexual harassment when 1) submission to such conduct is made either implicitly or explicitly a term or condition of an individual's employment, 2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or 3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." EEOC Interpretative Guidelines on Discrimination Because of Sex Under Title VII, 29 CFR 1604.11.

   b. "Objectionable emphasis on the sexuality or sexual identity of a student by (or with the acquiescence of) an agent of an educational institution when (1) the objectionable acts are directed toward students of only one gender, and (2) the intent or effect of the objectionable acts is to limit or deny full and equal participation in educational services, opportunities or benefits on the basis of sex; or (3) the intent or effect of the objectionable acts is to create an intimidating, hostile, or offensive academic environment for the members of one sex." A recommended definition from A Report on

the Sexual Harassment of Students, National Advisory Council on Women's Educational Programs, August 1980.

C. Policy Formation and Adoption

1. While all constituent groups may need to be consulted by the administration, the most concerned and interested group will be the faculty. A policy prohibiting sexual harassment in effect establishes a new "cause" for termination of tenure.

2. Policy issue will necessarily be tied to enforcement - grievance procedures -mechanisms, as constituent groups will want to know who will be reviewing their conduct if an allegation of violation is made against them.

3. For a policy to be effective and meaningful as a statement of principle, it should be adopted by the normal body or person who traditionally adopts such principles, e.g., the Board of Trustees or President.

4. Once adopted it should be publicized.

"Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned." EEOC Interpretative Guidelines, infra.

II. Grievance Procedures

A. Need for Grievance Procedure

1. To enforce policy prohibiting sexual harassment.

2. To afford due process to those accused, and those accusing others, of sexual harassment.

3. Further insulate the institution from liability for actions of its employees in violation of the prohibition against sexual harassment.

   a. Courts have been reluctant to find liability of an employer under Title VII sexual harassment theory where the employee failed to complain and the employer had in place effective grievance procedures. See Barnes, infra, Tompkins v. Public Service Electric and Gas Co., 422 F. Supp. 553 (D. N.J., 1976).

   b. Title IX requires institutions to "adopt and publish grievance procedures providing for prompt and equitable resolution of student...complaints alleging any action which would be prohibited by this part." 34 CFR 106.8(b). If sexual harassment is a form of sex discrimination under Title IX, as inferred in Alexander v. Yale University, infra, such procedures must exist. The absence of such procedures is, in itself, a violation of Title IX.

B. Elements in a Grievance Procedure.

1. An informal counseling network, utilizing student services personnel, mental health care professionals, the campus ombudsman, and other available campus resources, should be developed to resolve problems at early stages.

   a. Anonymity of complainant can be protected.

   b. No record keeping necessary.

c. Utilizes normal campus mechanisms available to assist and resolve student and employee problems.

2. Official procedure should commence with an informal conciliation stage. One person should be officially identified as the recipient of complaints, and empowered to intervene/discuss matters with respondent.

   a. Anonymity of complainant can be preserved.

   b. Record keeping maintained by officially designated person. Allows accumulation of data on complaints and respondents for purposes of determining whether a pattern of conduct by one person is present. Provides historical evidence if formal written complaint filed.

3. Formal stages of procedure commences with the filing of a signed, written complaint with a specifically designated person or committee.* By identifying single place for receipt of formal complaints, establishes official notice to institution that a complaint is made. Anonymity of complaint probably cannot be protected once a written complaint is formally filed. It is advisable to provide respondent a copy of the written complaint in order to fully advise him/her of the matter so defense or response can be prepared.

4. Investigation of the formal complaint may be the most critical stage in procedure. Several options possible:

* Because different university constituencies may require different personnel involved in formal process, more than one track for formal complaints may be advisable.

a. Central Office (example: Vice President for Academic Affairs) responsible for full investigation and report preparation determining whether "just cause" is present to pursue job or disciplinary action against respondent. (University of Washington)

b. Neutral committee functions as hearing body on complaint. Burden of proof rests with each party to prove or deny allegation. (Yale University)

5. Administrative action based on investigation or fact finding hearing determines if job or disciplinary action will be taken by university against respondent. If such action warranted, would be best to then utilize existing due process mechanisms for faculty/staff/student discipline or dismissal.

Grievance Procedure

Alleged Harassment Occurs

↓

Informal Counseling Network

* Student Affairs
* Health Services Staff
* Employment Assistance Office
* Ombudsman

↓

Official Informal Procedure

* Central designated official attempt mediation and resolution

↓

Formal Procedure Commenced by Signed Written Complaint

* Central investigating/fact finding body (various alternatives)
* Recommendations and finding of facts

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Administrative Action

* Dean, Provost, or President

↙ ↘

Dismisses Complaint

* Appeal right to hearing body if not before given

Job or Disciplinary Action

* Existing Campus Due Process Procedures

LEGAL CONSIDERATIONS IN DRAFTING SEXUAL HARASSMENT POLICIES FOR PUBLIC UNIVERSITIES

June 22-25, 1986

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I. TYPES OF SEXUAL HARASSMENT

A. Title VII Guidelines (29 C.F.R. 1604.11) define sexual harassment: "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

B. Judicial Classifications.

1. Quid pro Quo sexual harassment.

In Barnes v. Costle, 561 F.2d 983 (D.C.Cir., 1977), shortly after commencing employment, a female government worker was asked for sexual favors by the director. She was advised that if she cooperated, her employment status would be enhanced. She resisted. Thereafter, the director, with the help of others, began a campaign to belittle, harass and to strip her of her duties, ultimately resulting in a position to abolish her job. The court found a violation of Title VII.

A single incident of quid pro quo sexual harassment under Title VII may be sufficient to sustain this type of charge. Downes v. F.A.A., 775 F.2d 288, 291 (Fed.Cir., 1985); Joyner v. AAA Cooper Transportation, 597 F.Supp. 537 (M.D. Ala., 1983).

2. Pervasive sexual harassment by superiors not involving adverse employment action.

In Bundy v. Jackson, 561 F.2d 983 (D.C.Cir., 1977), a female government worker with the Department of Corrections was sexually harassed by her first line supervisor. He continually called her into his office and made sexual advances. When she complained to a higher supervisor, he proceeded himself to ask for sexual favors. The lower court had found that sexual harassment of female employees was "standard operating procedure."

The court found that the Federal employer had violated Title VII even without evidence that the victim had resisted and without evidence of a specific adverse employment action such as dismissal or demotion.

3. Abusive sexual harassment.

This form of sexual harassment involves physical, verbal or demonstrative conduct which "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment" (29 C.F.R. 1604.11(a)(3)).

In Katz v. Dole, 709 F.2d 251 (1983), plaintiff was personally the object of verbal sexual harrassment by her fellow employees. The court noted that "The words used were ones widely recognized as not only improper but as intensely degrading, deriving their power to wound not only from their meaning but also from 'the disgust and violence they express phonetically.'"

To establish a claim of sexual harassment for creating an intimidating, hostile or offensive environment, the decisions which have recognized a claim based on that type of misconduct have required at least two elements: (1) the offensive conduct must be sufficiently pervasive so as to alter the conditions of employment, and (2) be sufficiently severe and persistent to affect seriously the psychological well-being of an employee. Erebia v. Chrysler Plastic Products Corporation, 772 F.2d 1250 (6th Cir., 1985); Downes v. F.A.A., 775 F.2d 288, 292-293 (Fed.Cir., 1985); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir.1982); Bundy v. Jackson, 641 F.2d 934, 943-44 (D.C.Cir. 1981); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir.) cert. denied, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972); and Coley v. Consolidated Rail Corp., 561 F.Supp. 645, 649 (E.D.Mich.1982).

Abusive sexual harrassment does not involve a request for sexual favors. In Bundy v. Jackson, supra, at 945, the court stated:

"...Sexual stereotyping through discriminatory dress requirements may be benign in intent, and may offend women only in a general, atmospheric manner, yet it violates Title VII. Racial slurs, though intentional and directed at individuals, may still be just verbal insults, yet they too may create Title VII liability. How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal?"

Abusive sexual harassment is most common when a woman employee has been introduced into a traditionally male dominated work environment.

C. Theoretical Framework.

A Harvard Law Review Article (97 Har.L.Rev. 1449) describes two conceptual frameworks for viewing sexual harassment problems. The earlier framework views sexual harassment as a personal rather than a social phenomenon involving egregious, infrequent conduct engaged in by powerful individuals who should know better than to use their power to extort sexual concessions. The later developed framework suggests that sexual harassment in the workplace stems from an imbalance of power between men and women. Under the latter framework, sexual harassment may be defined as "the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person."

D. Conduct evidencing sexual harassment.

1. Physical

2. Verbal (specific or implied)

3. Graphic

4. Hazing

E. Compare sexual harassment in employment context from academic context.

1. Both involve a person in authority initiating sexual conduct against a less powerful person.

2. Both may involve quid pro quo, pervasive or abusive sex harassment.

3. Case law indicates that the University has less potential liability from sex harassment charges in academic context than in employment context. See Alexander v. Yale University, 631 F.2d 178 (2d Cir., 1980); Moire v. Temple University School of Medicine, 613 F.Supp. 1360 (D.C., Pa., 1985).

4. Based on the standards of the profession, the standards of the University and the nature of the relationship, a professor may owe a higher duty of care not to sexually harass students in his/her class. See Korf v. Ball State University, 726 F.2d 1222 (7th Cir., 1984).

II. STATUTORY CONTEXT

A. Title VII (42 U.S.C. Sec. 2000e-2) makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...sex."

Title VII is not limited to disparate treatment founded solely or categorically on gender. Rather, discrimination is sex discrimination whenever sex is for no legitimate reason a substantial factor in the discrimination. Bundy v. Jackson, 641 F.2d 934, 942 (D.C.Cir., 1981); Barnes v. Costle, 561 F.2d 983, 990 (D.C.Cir., 1977). Title VII covers discrimination accomplished through sexual harassment by any supervisory employee with authority to hire, promote or fire. Vinson v. Taylor, 753 F.2d 141, 149-150 (D.C.Cir., 1985).

B. Title IX (20 U.S.C. 1681) states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Harassment of a student by tying academic advancement to submission to sexual pressures constitutes sex discrimination in education. Moire v. Temple University School of Medicine, 613 F.Supp. 1360, 1366 (D.C.Pa., 1985); Durham v. Parks, 564 F.Supp. 244, 249-250 (D.C.Minn. 1983). A university's failure to investigate a claim that academic advancement was conditioned upon submission to sexual demands may be a violation of Title IX. Alexander v. Yale University, 459 F.Supp. 1, 4 (1977); affirmed 631 F.2d 178 (2d. Cir., 1980).

C. State Law (e.g., California Government Code Sec. 12940 makes it an unlawful employment practice "for an employer...or any other person, because of...sex...to harass an employee or applicant. Harassment of an employee or applicant by an employer other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.")

III. LEGAL CONSEQUENCES OF IMPLEMENTING A CAMPUS SEX HARASSMENT POLICY

A. Existence of policy per se does not insulate University from liability. But, should a supervisor contravene policy without University's knowledge and, upon discovery, University rectifies consequences, no liability under Title VII. Vinson v. Taylor, 753 F.2d 141, 150 (D.C.Cir., 1985); Miller v. Bank of America, 600 F.2d 211 (9th Cir., 1979); Howard v. National Cash Register, 388 F.Supp. 603, 605-606 (S.D. Ohio 1975); Barnes v. Costle, 561 F.2d 983, 993 (D.C. Cir., 1977).

B. The policy should provide supervisors with notice of possible disciplinary action and potential personal liability for participation in or condonation of sex harassment. Estate of Scott by Scott v. deLeon, 603 F.Supp. 1328, 1334 (D.C. Mich. 1985).

C. University policy may be used to define a specific standard of unlawful conduct which could be the basis for disciplinary action. A stricter standard may apply to the faculty-student context because of the special nature of that relationship.

(1) Courts have noted that "a teacher in a public school system is regarded by the public and pupils in light of an exemplar whose words and actions are likely to be followed by the [students] coming under [his or her] care and protection." Board of Education v. Swan, 41 Cal.2d 546, 261 P.2d 261 (1953). It would seem that, as a minimum, responsible conduct upon the part of teachers, even at the college level, excludes meretricious relationships with [his or her] students." Board of Trustees v. Stubblefield, 16 C.A.3d 820, 94 Cal.Rptr. 318 (1971).

In Korf v. Ball State University, 726 F.2d 1222 (7th Cir., 1984), a professor claimed that he had been wrongfully dismissed because he had no notice that consensual homosexual relations with his students could be the basis for disciplinary action. The court found that the professor had been properly dismissed on the basis of the University's adoption of the AAUP Statement of Professional Ethics, which stated in part:

> "As a teacher, the professor...demonstrates respect for the student as an individual and adheres to his proper role as intellectual guide and counselor.... He avoids any exploitation of students for his private advantage...."

The court also found that it was patently clear that the professor had violated the AAUP statement and that the University's action "was rationally related to its responsibility to establish and maintain high ethical standards within the University in order to maintain a proper academic

environment." See Cockburn v. Santa Monica Community College, 161 Cal.App.3d 734, 207 Cal.Rptr. 589 (1985); Brown v. California State Personnel Board (Trustees of California State Colleges and University System, 166 Cal.App.3d 1151, 213 Cal.Rptr. 53 (1985).

(2) In the employer-employee context, courts have upheld the discharge of management personnel for violating company policies prohibiting consentual sexual relations between managers and subordinates. Ward v. Frito-Lay, Inc., 95 Wisc.2d 372, 290 N.W.2d 536 (1980); Rogers v. International Bus. Machines Corp., 500 F.Supp.867 (W.D.,Pa. 1980). In Crosier v. United Parcel Service, Inc., 150 Cal.App.3d 1132, 198 Cal.Rptr. 361 (1983), the court noted that the company had legitimate reasons for adopting such a policy because of concern with the appearance of favoritism, employee dissension created by romantic relationships between management and nonmanagement employees, and possible claims of sexual harassment.

D. University's failure to follow its own sex harassment policy could (1) establish University liability for sex harassment, and (2) constitute basis for University grievance.

IV. BALANCING THE INTERESTS OF THE PARTIES

A. University.

1. Provide information and counseling about sexual harassment.

2. Require all allegations to be documented.

3. Maintain confidentiality to extent legally possible.

4. Provide alleged perpetrator with due process.

5. Provide clear, easily accessible complaint procedures and timely investigation.

B. Victim.

1. Define what legal protection University can provide.

(a) A public university generally provides its employees with legal defense and indemnification for actions taken within the scope of employment. Should a policy statement state that in appropriate cases the University would defend an employee against private legal proceedings by a sex harassment perpetrator?

(b) Query: What legal protection can/should a public university offer a student complainant against private legal proceedings brought by a sex harassment perpetrator?

2. What confidentiality can a public University promise?

(a) Unless privileged, records of allegations of sex harassment can (1) expose University to prosecution for failure to effectively deal with sex harassment allegations, or (2) expose complainant to unwanted publicity or adverse legal proceedings.

(b) Separate counseling resources from sex harassment enforcement.

Attempts to informally resolve complaints must balance victim's desire for confidentiality with University's independent responsibility to eliminate sexual harassment and with alleged perpetrator's right to be confronted with charges.

3. Policy should define separate role of counselor/ investigator.

(a) Counselor should not maintain written records unless they are privileged. Victim should be informed that no action will be taken by University as result of discussion with counselor, and that if victim wants to pursue matter, she must talk to investigator.

(b) Investigator should separate role of developing case from pursuing informal resolution. Victim's identity should be held confidential during investigation stage.

C. Alleged Perpetrator.

1. Provide clear notice of wrongful conduct.

2. Require written statement of allegations before starting investigation.

3. Provide informal, timely opportunity to respond.

V. COORDINATION OF SEX HARASSMENT POLICY WITH OTHER PROCEDURES

A. A sexual harassment policy should be different from other policies. It must take into account that a University may be held liable for actions by employees which were outside the scope of employment and for which the University would not be liable based on the common law doctrine of respondeat superior. Vinson v. Taylor, 753 F.2d 141, 150 (D.C.Cir., 1985). It must also take into account the University's duty to rectify the consequences of sexual harassment. Therefore, a sexual harassment policy should be coordinated with University disciplinary and grievance procedures.

B. A policy should state that in appropriate cases, the University will institute disciplinary action against alleged perpetrators.

C. A policy should state that in the event a victim is dissatisfied with the University's action to eliminate the consequences of sexual harassment, he or she may file a grievance against the University.

D. A policy should indicate if the University is required to have certain procedures relating to sexual harassment. For example, the Title IX regulations (45 C.F.R. 86.8) require recipients of Federal financial assistance to adopt and publish grievance procedures available to students and employees to resolve complaints alleging violation of any matter covered by Title IX.

VI. ELEMENTS OF A SEX HARASSMENT POLICY.

A. Definition and Examples.

A sexual harrassment policy should contain a clear explanation of the behavior prohibited. The definition contained in 29 C.F.R. 1604.11 is widely used. However, giving examples or including classifications contained in case law may provide further understanding. The policy should explain that sexual harrassment is a specific form of sex discrimination which is prohibited by other university policies.

B. Scope of Coverage.

The policy should define whether it applies to students, faculty, administration, united or non-united employees. It should explain how the sexual harrassment policy will be coordinated with university grievance and disciplinary policies.

C. Standards of Conduct.

The policy may define or refer to other University documents (e.g., Codes of Conduct, disciplinary statutes) which define the standard which will be applied in determining whether faculty, supervisory or fellow employees have committed sex harassment.

D. Procedures Available to Sexual Harrassment Victims.

1. Information and Counseling.

This should be an optional and confidential procedure to make available to victims information about applicable laws, University policies, options available to for resolution of complaints and confidentiality requirements.

2. Complaint Resolution.

This procedure should involve the initiation of a formal complaint. Ordinarily the University should require a written statement from the victim unless there is independent evidence to establish a prima facie case of sex harassment.

3. University Investigation.

The procedure should specify that upon receipt of prima facie evidence of sex harassment, the University shall conduct a full, impartial and timely investigation.

E. Possible University Action Against Alleged Perpetrators.

This procedure should describe the alternative actions available to the University. It should also define the due process procedures which will be accorded an alleged perpetrator. Alternative actions include:

1. Informal resolution.

2. Reprimand.

3. Disciplinary action.

4. No action warranted.

F. Assurances against Non-retaliation.

The policy should affirm that retaliation for filing a complaint is prohibited.

G. Complainant's Right to Grieve University's Actions.

The policy should explain that a victim has the right to grieve. The grievance should be based on allegations that (1) the grievant has been the victim of acts of sexual harassment by University faculty or employees, and (2) the University has failed to take timely and effective action to remedy the matter.

H. External Procedures.

The policy should refer to the procedures outside the University (e.g., Title VII, Title IX, state law) which are available to help remedy claims of sexual harassment.

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